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Supreme Court of the United States

OCTOBER TERM, 1944.

INTERNATIONAL UNION OF MINE, MILL, AND SMELTER WORKERS, LOCALS Nos. 15, 17, 107, 108 AND 111, AFFILIATED WITH THE CONGRESS OF INDUSTRIAL ORGANIZATION,

Petitioners,

VS.

EAGLE-PICHER MINING & SMELTING COMPANY, A CORPORATION, EAGLE-PICHER LEAD COMPANY, A CORPORATION, AND NATIONAL LABOR RELATIONS BOARD,

Respondents.

No. 337.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF ON BEHALF OF RESPONDENTS EAGLE-PICHER MINING & SMELTING COMPANY, AND EAGLE-PICHER LEAD COMPANY.

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A.

OPINIONS OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit, sought to be reviewed,

is now officially reported (R. 307; 141 F. 2d 843). The incidental order of the Court denying petitioners' motion to modify or to remand was entered, in connection with the Board petition for rehearing, without opinion (R. 343). The opinion of the court below, enforcing at the instance of the National Labor Relations Board, the order of the latter, is also officially reported (R. 187; 119 F. 2d 903).

B.

JURISDICTION.

The jurisdiction of this Court is sought to be invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and Section 10(e) and (f) of the National Labor Relations Act. Such jurisdiction is lacking for the reasons hereafter appearing.

C.

STATUTE INVOLVED.

The statute of the United States allegedly involved is the following: National Labor Relations Act (29 U. S. C. A., Ch. 7, Sec. 151, *et seq.*; 49 Stat. 449).

D.

QUESTIONS PRESENTED.

The purported questions presented, although, as respondents contend, they were not presented below or involved in that decision, are without substantial support in the record, are novel here, and hence are not reviewable, are thus phrased by petitioners:

"1. Does the authority of the National Labor Relations Board to make all findings of fact and to determine the means whereby the effects of prior unfair labor practices are to be expunged terminate with the entry of a decree enforcing its order, so that thereafter, when the Board determines from facts appearing for the first time during its compliance investigations that the unexecuted provisions of the decree must be modified in order to achieve the relief intended, and so represents to the court in a petition to vacate and remand, the court may substitute its appraisal of the old and new evidence and of the effectiveness of the old decree for that of the Board?

"2. Does the existence of a verbal or mathematical mistake in the Board's formulation of the back pay remedy, embodied in the decree, warrant modification or remand of the back pay provisions of the decree so as to fulfill the Board's intent and purpose to 'make whole' the 209 workmen concerned?

"3. In making its order for restitution of future wages likely to be lost during the discrimination period following the close of the hearing before the Board's trial examiner, the Board was forced to prognosticate the employment situation which would exist after the hearing and to base such back pay provisions upon hypothesis instead of proven fact. Irrespective of any other consideration, did the court below act improperly in refusing to modify or to vacate and remand such back pay provisions when the facts as they materialized differed from those hypothesized by the Board?"

The issues of finality of judgment, and relinquishment by the court below of control over its own judicial processes to an administrative agency, are concealed behind these academic abstractions. They will be discussed hereafter.

E.

STATEMENT OF THE CASE.

Petitioners in this proceeding seek to review the ruling of the court below declining to vacate in part a final enforcement decree entered at their instance and by the procurement of the National Labor Relations Board. That court so ruled upon the ground that there was no sufficient factual basis to justify the action requested by petitioners. The labor controversy, which is the subject matter involved, had its origin in a strike of respondents' employees, as well as the employees of other mining operators, in the Tri-State area of Missouri, Kansas and Oklahoma, called by petitioners on May 8, 1935. Charges were filed by petitioners with the National Labor Relations Board, and the latter filed its complaint on May 23, 1936. Hearings thereon began December 6, 1937, and concluded April 29, 1938. An intermediate report was filed on August 31, 1938 (Tr. 13339). A final order by the Board was filed on October 27, 1939. Respondents filed a petition for review on November 6, 1939, and the Board countered with a cross petition for enforcement (Chronology, Pet. Br. p. V). On May 21, 1941, an opinion was entered by the court below enforcing the Board order, and on June 27, 1941, a decree was filed pursuant thereto. That decree became a finality, and respondents proceeded to comply therewith. An extended audit was required under the remedial formula, relating to the back-wage award; this audit was conducted by respondents and a tender of the net amount due, after deduction of interim wages, was duly made. On February 4, 1943, the Board filed a petition in the court below to vacate the final decree *in part*, and to remand and vacate the process of the final decree to that administrative agency. After appro-

priately challenging the jurisdiction of the court, respondents, pursuant to order, joined issue by answer wherein, by leave granted, they joined pleas to the jurisdiction, motions to dismiss, demurrers, and defenses to the merits. Therein, by verified averments, the allegations of the Board petition were categorically denied (R. 281). The nature of the Board proceeding, and the ruling below, can best be demonstrated by quotation (141 F. 2d 843, l. c. 845):

> "The National Labor Relations Board filed a petition in the nature of a bill of review to set aside, for fraud, mistake and newly discovered evidence, paragraphs 2 (d) and 3 (b) of the final decree of this Court in this case dated and entered June 27, 1941, and to remand the subject matter of those paragraphs to the Board for further proceedings. The Eagle-Picher Mining and Smelting Company and Eagle-Picher Lead Company have filed their answers to the Board's petition. The answer challenges this Court's jurisdiction and the sufficiency of the petition. The Board has now moved for judgment on the record and the pleadings, upon the grounds that no genuine issue of facts exists with respect to any material allegation of the petition and that the Board, as a matter of law, is entitled to the relief prayed for. The companies assert that the motion of the Board is without merit and should be denied and that the petition of the Board should be dismissed.
>
> * * * * * * *
>
> "We are not convinced upon the showing in these proceedings that the parts of the order and decree attacked were obtained by misrepresentation or wrongful conduct of the companies, or that on account of any mistake of the Board perversion of justice or unfair administration of the Act has been established justifying revocation or remand to the Board of the parts of the decree involved.

> "Our conclusion is that, while this Court has jurisdiction over the enforcement of all of the provisions of its decree which remain unexecuted, *the petition of the Board and the record in this case present an insufficient factual basis* for setting aside paragraphs 2 (d) and 3 (b) of the decree and for remanding the subject matter thereof to the Board. The motion of the Board for judgment upon its petition is therefore denied, and the petition is dismissed." (Italics ours).

It will be noted that the Board filed a motion for judgment upon the pleadings despite the categorical denials contained in respondents' verified answer. After the opinion below petitioners filed a motion to modify the decree or to remand, which is tantamount to the Board motion for judgment upon the pleadings since it sought such modification or remand upon the face of the record, without hearing or trial (R. 329). Both the Board petition for rehearing, and petitioners' motion to modify, were denied below on May 17, 1944 (R. 343). The Board took no further action, but petitioners have sought this review by certiorari.

A reference to the issues upon this review is essential to a clear understanding of the pertinence of the material facts to be stated. We do not understand that petitioners assail the factual conclusion reached by the court below, but assert that in venturing to determine that issue, although it was presented by the pleadings of the litigants, that court invaded the administrative province of the Board. Petitioners frankly seek this review upon the avowed premise that the doctrine of finality of judgment has no application to a judicial decree of enforcement procured by the National Labor Relations Board from a United States Circuit Court of Appeals. They ignore the doctrine that any judgment becomes final upon the end of the term; they ignore further the statutory pro-

vision that the judgment and decree of the Circuit Court of Appeals, upon a review or enforcement proceeding, "shall be final * * *." National Labor Relations Act, 29 U. S. C. A., Sec. 160, p. 239. They equally ignore the controlling provision of the same statute whereby, upon review or enforcement proceedings, the Board is deprived of jurisdiction and exclusive jurisdiction vested in the Circuit Court of Appeals. Petitioners urge, however, that after the Board has been thus deprived of jurisdiction, after exclusive jurisdiction has been vested in the court, and after such a final decree, and compliance therewith by the employer,* the Board, at the instance of the interested Union, and the back-wage claimants, may (with or without judicial approval) vacate, modify, or rewrite the judicial decree, to render it more onerous upon the employer theretofore complying therewith, and to exact supplemental penalties from that employer, upon the mere ground that the original decree (enforced at the Board request, wherein the complaining union joined) was, upon reconsideration by the Board years later, insufficiently punitive "to effectuate the purposes of the Act," that the Circuit Court of Appeals, despite the finality of the decree, upon motion *either* of the Board *or* the interested Union and the back-wage claimants, *must* (*eo instante*, as a matter of law) acquiesce and either rewrite its final decree (after the term) as thus requested, or remand that decree to the Board for its modification thereof, thereby surrendering to an administrative agency all control over

*Respondents, before the proceeding below, complied, or attempted to comply, with the final decree. If their interpretation of the formula in the Board remedy is correct, they fully complied. If, however, the undisclosed Board interpretation (requiring the payment of approximately $200,000 as a back-wage award) is correct, the Board can enforce the decree by proceedings for contempt. In either event the issue is identical, and the decree complied with or sought to be complied with is final.

the judicial process, and that the Union and the back-wage claimants may, upon certiorari, compel the court below thus to designate an administrative agency to reform, modify, nullify, or vacate that final judicial decree in the discretion of the latter. Under such a doctrine the Board would become all-controlling, and the court below would be without authority over its own judgments or decrees. Petitioners do not assert, or predicate alleged error on, any claim that either by pleadings or proof below they satisfied the exigent requisites of a bill of review (*Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 321 U. S. 238, 88 L. Ed. 936, l. c. 942 and 948, n. 4). The most cursory scrutiny of the questions here presented (Pet. Br. p. 2) will confirm this assumption. The petitioners contend (*first question presented*) that the court below was bound *conclusively* by the representations of the Board, and of the Union and the back-wage claimants; that the facts were as stated in their pleadings and that the decree should be modified as requested, and could not judicially consider or determine the issue whether there was a factual or legal basis for the representations thus made (by which doctrine the Circuit Court of Appeals would surrender and abdicate from all judicial functions and divest itself of control over its own processes); secondly (*second question presented*) that the interested Union (for such was not the Board position below) may require, as a matter of law, without hearing or evidence, the modification of that final judicial decree, or a remand to the Board to accomplish the same objective, upon the sole ground that the original Board order enforced by the decree, was upon its face inadvertently erroneous, although that Union not only failed to pursue the statutory remedy to correct the error but joined with the Board in the procurement of the decree assailed; and thirdly (*third question presented*) that, be-

cause allegedly the Board created a remedy without factual basis therefor, over the opposition of the employer, thereafter, with the Union concurring and assisting; transmuting that remedy into a final enforcement decree, the Union should be permitted to disregard the decree in question and, insofar as it affected back-wage rights after its date, compel upon mere motion, without trial or hearing, its annulment. Comment is unnecessary if the judicial process is to be retained. It may be stated parenthetically that, although petitioners constantly speak of a change of employment conditions, with the inference that there was such a change after the close of the hearing below, the evidence is conclusively to the contrary. As demonstrated hereafter from the undisputed record, the employment facts adverted to by petitioners existed from 1935 onwards, and were fully known both to the Board and the enforcing court at the time of and prior to the decree. With full knowledge of the facts the then Board provided a given remedy, and procured enforcement thereof, against respondents' opposition, by the court below. Six years later the interested Union asks this court to nullify the decree which it joined in procuring, upon the ground that the successor Board, upon reconsideration, desires an opportunity to increase the penalty against the complying employer.

The Original Proceeding.*

The facts in the original hearing before the Trial Examiner are material only insofar as they pertain to

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*Respondents opposed the filing of the printed record in this proceeding as manifestly inadequate. They reiterate their objections thereto (Brief in Opposition to Certiorari, p. 14 *et seq.*). Reference however to the printed record will be thus designated (*e. g.*, R. 1). Reference to the typewritten transcript, unprinted, will be thus designated (*e. g.*, Tr. 1).

the issue of alleged discrimination, *i. e.*, the charge by the Board that respondents refused to reinstate the claimants on or after July 5, 1935, for discriminatory reasons, and insofar as they furnish the grounds for the Board action in contriving the remedy now sought to be vacated after its incorporation in a final judicial decree.** The general background of the labor controversy involved is found in the lead and zinc industry in the so-called Tri-State area of Missouri, Kansas and Oklahoma. It is one of the great zinc producing localities of the world. Respondents constitute two of the approximately fifty operators in the district. The charges involved in the original action were leveled against all operators. Eagle-Picher Mining and Smelting Company is a subsidiary of Eagle-Picher Lead Company. In the particular area involved Eagle-Picher Lead Company operated only the Joplin smelter. Eagle-Picher Mining and Smelting Company operated the various mines, the Central Mill and the Galena smelter. This was an area which had known many years of industrial peace. Throughout its extent, on the part of all operators, approximately 7,000 to 7,500 men were employed (Tr. 7412). Employment varied necessarily with the price of ore and the operation or non-operation of marginal mines. Since reference will be made hereafter to the irregularity of the employment of the claimants before the strike of May 8, 1935, some explanation of employment procedure is necessary. The mining and smelting of zinc and lead are hazardous enterprises, and as a result subject to stringent statutory regulations in Missouri, Oklahoma and Kansas. Opera-

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**Petitioners, apparently for purposes of prejudice, have purported to recite facts irrelevant to the issue. Significantly record citations furnished are not to the transcript, but to the Board order or Board or Union pleadings. We refer the Court to the original opinion below, which directed enforcement of the Board order, for a review of these facts (R. 187; 119 F. 2d 903).

tors are constantly subjected to silicosis and lead-poisoning claims. As a result, long before the strike and admittedly not in anticipation thereof, the operators established an employment system to insure both the capacity and the personal character of their employees (Tr. 7227). The claimants were admittedly familiar therewith (Tr. 455, 679, 682, 825, 829, 1031, 1588, 1787, 1792, 2163, 2424, 2638, 4743, 5207, 5732, 5755). Personnel representatives were established to control the employment of men. Initial physical examinations were required; this was by statutory compulsion in two of the jurisdictions. Supervisory employees, other than the personnel officers, were deprived of the right to hire (Tr. 7227). A system was thereupon established wherein men, approved for employment by the personnel officers of the various operators, were issued "rustling" or "work" cards. Possessed of such a card, a condition precedent to employment, any man could obtain work at any mine or smelter where there was an existing vacancy. As a result the employment of the claimants by any particular operator was exceedingly irregular; a given worker, possessed of cards from several operators, might be employed at a great number of mines or smelters, and by many different operators, during a given year. This employment system is exceedingly material upon the issue of discrimination since the record shows that throughout 1935 no application for a "rustling" card by a former employee was ever rejected by the personnel officer of respondents (Tr. 6625, 6712, 7261, 7262).

The events leading up to the strike were these: At some time prior to 1935 the International Union determined to organize the employees of the Tri-State area. Conferences were held with operators (Tr. 131). The Board exhibits at the original hearing (Nos. 240, 241, 242) revealed that at the very time of this activity by union officials

there had developed a marked loss of interest on the part of members or former members of the International Union. On March 13, 1935, the Union demanded of all operators in the Tri-State area that the latter appoint a single committee to meet with a single committee of the International Union to bargain collectively for the entire district as a single bargaining unit. No conferences were sought with respondents or other operators. No complaint was ever made as to wages, hours or working conditions. The sole demand of the Union was that it be recognized as the exclusive bargaining agency for all employees in the district. The executives of the International Union determined upon a strike, to enforce this demand, and a secret strike vote was held upon three days notice (Tr. 64). That notice consisted only of posting in union halls, where the unemployed only would congregate; this is the testimony from union officials (Tr. 64). According to the Union testimony only approximately 600 men cast ballots on the issue of the strike, which was to deprive 7500 men of their employment (Tr. 64, 7412). Union officials testified that this minority vote stopped "every wheel turning" in every mine, mill and smelter in the Tri-State field (Tr. 111, 141, 2608). Without prior conferences or negotiations, respondents were suddenly notified by a union official at three o'clock in the afternoon that a strike had been declared effective at midnight that night (Tr. 51). It is conceded, the Board found, the court below held, that this strike was declared solely to compel recognition of the International Union as an exclusive bargaining agency, despite the fact that it did not represent a majority of the employees. The strike was directed against the district and not against any particular operator. It was designed to compel recognition of the Union by all operators irrespective of whether the International Union could boast a single member in the employ of any particular operator.

It was an organization drive, and International officials of the International Union were in attendance (Tr. 51, 2605). The circumstances are reviewed in the original opinion below (R. 191, 192).

The evidence overwhelmingly demonstrated that the International Union was a minority organization, that its claim to recognition for which the strike was declared was without any basis whatsoever, and that respondents were justified in refusing, and after July 5, 1935, compelled to refuse, to extend it recognition. The Board concedes this (Tr. 13342; R. 128). Thus the Board found (R. 128):

> "The evidence fails to establish that the International on or after May 8, 1935, represented a majority of the respondents' employees in an appropriate unit. The evidence further shows that in the period in question, the International itself was unable to determine the precise extent of its own membership."

Thus it affirmatively appears beyond dispute that on or after July 5, 1935, the effective date of the National Labor Relations Act, respondents were prohibited by law from granting the recognition demanded by the Union as a condition to terminating the strike; the Union officials, however, persisted in the demand, and the illegal strike continued.

The record is convincing that this minority strike was intensely unpopular among workers of the district. Within a few days after its declaration back-to-work petitions were circulated. The operators had little incentive to attempt to break the strike. The price of ore was exceedingly low; mines were operating at a loss; overproduction had built up a surplus for the use of the smelters (Tr. 7264 *et seq.*). Whether the back-to-work movement was spontaneous, as asserted by respondents,

or inspired by operators, as asserted by the Board, is not material to the issues here. Responsibility for sporadic outbreaks of violence is equally irrelevant. It is suggestive, however, that the first organized violence was on the part of the International Union in assaulting a sheriff and his deputies (Tr. 394). The International Union paralyzed local law enforcement agencies, and the Governor of Oklahoma called out the National Guard (Tr. 2941). In the inter-union conflicts the International Union alone used firearms; the only dead were members of the Tri-State Union (Tr. 1962, 1963). The International Union marched as an army and besieged the Galena smelter of respondents; after a siege of approximately 36 hours, those within the smelter were rescued by the Kansas troops. The violence of the International Union is undisputed, and fully documented in the record (Tr. 2860 *et seq.*; 6500 *et seq.*; 4296, 6460, 6465, 6466, 6471, 6483, 6488, 6493, 6495, 6499; Resp. Exh. 67, 6488). During the course of these events respondents re-opened the mines and the Central Mill on June 12, 1935, and, as the Board found, had, with the exception of the Galena smelter, resumed normal operations by the middle of that month (R. 45). The Big John mine did not open until July 20, 1935, but it is not claimed that this delay was for other than purely economic reasons or that the strike or any shortage of labor had any connection therewith. The opening of the Galena smelter in the latter part of June was attended by the armed riot heretofore described. After the troops had put down the local disturbance, and relieved the siege, that smelter opened on July 16, 1935, and within a few days was in normal operation (Tr. 6627). The customary notice of re-opening was given by respondents and, in re-employment, former employees were given preference (Tr. 6670, 6826). No application of any former employee was rejected upon any ground (Tr. 7233, 7239, 7361). No strike-breakers were used.

It was the theory of the Board, throughout the hearing, that from and after the time of the strike, no man could obtain employment at Eagle-Picher unless he had a Blue Card (*i. e.*, unless he was a member of the Tri-State Union, or subsequently, the Blue Card Union). Each of the claimants seeking reinstatement or back-wages accordingly testified that he "understood" that, at all times after the strike, it was necessary to have a Blue Card to obtain employment with respondents (*e. g.*, Tr. 2546). The following is typical (Tr. 2546):

> "Q. Was it your understanding after the strike in 1935 that it was necessary to have a Blue Card in order to go to work for Eagle-Picher Company?
>
> Mr. Madden: Just a moment, now. I object to that as calling for a conclusion and not for a statement of fact, also as being a conclusion which under no circumstances could be binding upon the respondents. There is not any proof shown that any such understanding emanated from any act of the respondents.
>
> Trial Examiner Ringer: Overruled."

The question of the competency of this "understanding" was strenuously argued before the Trial Examiner (*e. g.* Tr. 2113, 2114, 2115). The Trial Examiner did not admit the "understanding" as binding upon respondents or as tending to prove the truth of it (Tr. 2115). From a questionnaire circulated by the Board and petitioners among the claimants, this purported understanding was apparently derived from the daily press (Resp. Exhs. 22, 23, 25, 34, 39). No attempt was made by the Board to show that this claimed "understanding" was in any manner attributable to respondents. The fact is that the overwhelming majority of these claimants had never applied for work with respondents after the strike or otherwise sought re-employment. It is stipulated that they at all

times remained on strike in attempted enforcement of the illegal demand for recognition of the International Union (Tr. 3247, 3248, 3249, 3252, 3255, 3256, 3789, 3882). The Board found that the strike for this illegal condition of employment was still continuing at the time of the final order (Tr. 13385). Thus the proof disclosed that their unemployment resulted from their strike activities, and eventually even counsel for the Board conceded that membership in the competitive union was not a condition precedent to employment by respondents (Tr. 7398, 7400). The Trial Examiner further held that "in so filling its rolls of employees (following the strike) the respondents did not require membership in the Tri-State Union as a condition of starting such employment * * * (Tr. 13339)." Counsel for the Board at the hearing declared that any claimant who abandoned the strike and applied for reemployment would have been a "scab" (Tr. 3475). Since it is conceded, however, that the International Union did not represent a majority, it is unmistakable that on or after July 5, 1935, respondents could not have legally granted to the International Union the recognition demanded. The present claimants, therefore, were declined re-employment except upon the granting of an illegal condition.

The Board evidence negatived the charge that respondents refused to reinstate the claimants upon discriminatory grounds, and to the contrary affirmatively disclosed that respondents offered full reinstatement. Thus on July 16, 1935, Potter, on behalf of respondents, conferred with various Union officials. These included the officers of all locals of the International Union (Tr. 2601). The proceedings at this conference were related both by a witness (Berry, International Union official) on behalf of the Board, and a witness (Campbell) on be-

half of petitioners. The occurrences at that conference are undisputed. This Union official testified (Tr. 2619):

> "I will say this for Mr. Potter, that I don't believe that I have talked to a man who was fairer and more open. He treated us with all courtesy in the world and the meeting broke up in just as good spirits as it had met in and he invited us at any time to come back."

The invitation was never accepted. In response to a highly leading suggestion from Board counsel that Potter was willing to confer with them as employees, but not as representatives of the Union, the witness replied (Tr. 2621):

> "A. At that meeting he did not. He accepted the Committee at their word and talked to them. We know nothing about any—we were invited as a Committee representing the various locals. *We went and were accepted as such.*"

One of the Union representatives was Brown, President of the International Union, a national officer (Tr. 2605). In response to an inquiry from Potter as to the demands being made by the International Union, Brown replied (Tr. 2607):

> "We * * * make the same demand *and just one*: that in consideration of the fact that our organization has enlisted in its membership a substantial majority of the employees in this District, *we are again demanding the right to act as sole collective bargaining agents for the employees.*"

Potter challenged the statement of majority representation and asserted, to the contrary, that his information revealed that the International Union had only a minority of the employees. *The Board held that Potter was right.* Potter, moreover, after originally pointing out in the con-

ference that all trouble might have been avoided if the International Union had conferred with him before the strike was declared (Tr. 2606), concluded the conference by proposing *that the International Union men return to work, build up their numerical strength, and then make their demand again on respondents* (Tr. 2618). It may be noted that Potter thereby not only proffered to, but urged upon, the striking members of the International Union their former employment; and as well, he not only did not *object* to International Union activities in organizing employees, but proposed such activities. The only response of the president of the International Union was that those terms were satisfactory if Potter would further agree in writing to "recognize them as * * * duly authorized collective bargaining agents" (Tr. 2619). Under the finding of the Board, that the International Union was a minority union, such recognition at that time by Potter, in writing or orally, would have violated the National Labor Relations Act. The Union representatives departed, and, although invited to return, did not do so.

Although the Board found that, *at that very time*, respondents were indulging in discrimination against the International Union and its members, this Union Committee made no such complaint. It is apparent from the entire context, moreover, that, throughout this conference, the International Union members were refusing, *and Potter was urging them*, to return to work. The Board nevertheless found, omitting all reference to this final and controlling conference, that the unemployment of members of the International Union, claimants in this proceeding, resulted from refusal (which never occurred) on the part of respondents to employ International Union members, and *not* to the continuance of the International Union strike in its attempt to obtain recognition. It is

a coincidence that Reid Robinson, successor to Brown, as President of the International Union, disapproved the strike in his Annual Report in 1937. In language reminiscent of Potter's (Tr. 6529):

> "The situation in the Tri-State District is a serious one and has many ramifications. In my opinion, the strike was ill-advised. The strike should have been called off as soon as the Militia arrived upon the scene, *getting the men back to work and reorganizing so that they could be successful at some future date.*"

Thus Robinson not only recognized the merit of Potter's suggestion, but clearly recognized that the men *could* have returned to work had they so desired, *and that it was the strike and not discrimination which prevented them from so doing.*

The Board had charged that respondents had, on discriminatory grounds, refused to reinstate the 209 claimants on and after July 5, 1935. Respondents were contending that the constituent elements of any claimed discriminatory refusal to reinstate were these: (1) an employee willing to work; (2) an existing vacancy in the employment of the employer; (3) an application for employment; and (4) an illegal refusal by the employer to re-employ the applicant in the available vacancy upon discriminatory grounds. Respondents further asserted that not only did the proof fail to establish the discriminatory refusal to reinstate, charged, but affirmatively negatived such alleged discrimination and disclosed that the unemployment of the claimants resulted from their unwillingness to work, absent the granting of the illegal condition of recognition, and their adherence to the strike policy of the Union. The Board, in formulating its final order finding discrimination against all claimants as of

July 5, 1935, was confronted by the following obstacles to a back-wage award: (a) that the claimants throughout the period in question were on strike, unwilling to work, and demanding the illegal recognition of the Union as an exclusive bargaining agency for all employees as a condition precedent to their return to their employment; (b) that on July 16, 1935, full reinstatement was offered them, and that offer was refused; (c) that the claimants were irregular workers* and that it would require an exceedingly violent presumption to declare that part time workers before the strike would have become full time workers after the strike; and (d) that the employment level following the strike never rose to the employment level prevailing before the strike, with the result that on July 5, 1935, the date when the Board found that discrimination began, there were only approximately 500 to 600 jobs available (even if no new men were hired) for the 1,100 pre-strike employees.** Faced with these difficulties the Board turned from fact to fiction, and created an artificial doctrine of discrimination, namely, that although on July 5, 1935, there were

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*The record discloses that the average annual earnings of the claimants, before the strike earned in respondents' employ, was $546.89. Appendix A of this brief lists the names of the claimants and the transcript citations as to pre-strike earnings. Hence, under any form of back-wage award, if pre-strike earnings were projected for the period from 1935 to 1941, and interim wages deducted, average earnings elsewhere of $50 per month would more than offset any award made. Petitioners argue, however, that *after* deducting net earnings elsewhere, each claimant should have received roughly $3,830 (Pet. Br. p. 17).

**Neither the Board nor petitioners contend that the post-strike employment level ever rose to the pre-strike employment level. It is conceded, in other words, that after July 5, 1935, jobs were fewer in number than previously. Thus Board counsel stated in their brief in the court below (p. 6, n. 5):

> "The companies increased their staffs thereafter, but never to the pre-strike extent."

insufficient jobs for pre-strike employees, and hence that it could not find that any particular claimant would, completely absent any element of discrimination, have been employed, respondents were nevertheless on that date, and thereafter, guilty of refusing to reinstate *all* claimants upon discriminatory grounds. A formula was thereupon contrived embracing (a) a lump-sum provision, and (b) a governing proportion. The former was predicated upon the theory that, although there was no proof of discrimination as to any particular claimant, *some* of the claimants would have been re-employed, absent discrimination, on July 5, 1935, and that their presumptive earnings should constitute a lump-sum for the benefit of all. The governing proportion proceeded from the acknowledged circumstance that the 200 claimants had no better title to available jobs than the 900 other pre-strike employees. In the enforcement proceedings this Board remedy was assailed by respondents as arbitrary and speculative in character; the Board and the petitioners, however, defended it, and at their instance it was incorporated in the final judicial decree. It will be noted that respondents' criticism of this remedy was rejected by the court below upon the ground that, since it amounted to less than a full back-wage award, the respondents were not prejudiced and could not complain (R. 207).

The Present Proceeding Below.

On February 4, 1943, the Board filed its petition in the nature of a bill of review (R. 213). The substantial allegation thereof was as follows (R. 216):

> "The Companies, upon the hearing and thereafter, inadvertently or otherwise, withheld from the Board material facts peculiarly within their knowledge concerning the employment situation existing in the enterprises involved in the complaint. By

means of evidence and representations, they induced the Board unaware of the facts so withheld and because said facts were not made known to it, mistakenly to conclude that an unusual condition existed, that the customary and normal remedy of full back pay to each employee discriminated against was inapplicable, and that a special remedy must be devised to conform to a state of conditions which in fact did not exist."

Further (R. 218):

"Thereby the Companies sought to show not only that at all times after July 5, 1935, employment opportunities at their properties were and would continue to be substantially less than they had been when the properties had last been operated prior to said date, but, in addition, that at all times after July 5, 1935, there had been and would be less than sufficient work to afford employment to all the claimants."

As will be hereinafter demonstrated, these allegations were affirmatively disproved by the original record; the court below so found (R. 307, 310). The Board contention below that, at the time of its final order, it had mistakenly believed that at all times after July 5, 1935, "there had been and would be less than sufficient work to afford employment to all the claimants" is in irreconcilable conflict with the explicit findings in that order. Thus the Board found (R. 94):

"* * * 172 names appear on the July 16 payroll which are not listed on July 5. Although no other payrolls were offered, the record shows that the respondents' operations continued to expand after July 15, 1935 * * *. Production is at its lowest ebb in July and is not at its peak until winter and spring. That a substantial number of employees were added after July 5, 1935, is shown by an examination of a 'labor

survey' prepared by the respondents and containing a number of men employed from day to day throughout the period in question. This survey shows that on July 5, 1935, 498 men were employed and on November 1, 1935, 864 men were employed.

"We find, therefore, that the respondents had not before July 5, 1935, reached the absorption point in their normal employment requirements, but that on and after July 5, 1935, they had jobs available at least to the extent indicated by the above figures."

It thus appears that the Board recognized that in the brief period from July 5, 1935, to July 16, 1935, 172 employees were hired, and that thereafter respondents' operations continued to expand. Thus it appears that the Board clearly recognized that within approximately ten days after the effective date of the Act jobs were opened up which could have been distributed among 172 of the approximately 200 claimants. The quoted excerpt from the order, moreover, shows that the predecessor Board was thoroughly familiar with the labor survey, showing month by month, week by week, and day by day, every available job, every man employed, by respondents in their operations from a time prior to the strike to a time approximately at the conclusion of the hearing before the Trial Examiner in 1938; these, moreover, were Board exhibits (Board Exhs. 260, 261, 262). The foregoing excerpt further shows that the predecessor Board recognized that between July 5, 1935, and November 1, 1935, an additional 366 men were employed. Since the present claimants number only approximately 200, we suggest that it was a transparent absurdity for the successor Board in the proceeding below to insist that its predecessor understood that after July 5, 1935, employment increased by less than the number of claimants. The quoted finding in the order repudiates such a contention more effectively than any argument. The "pe-

culiar factual situation," discussed in the Board order, was merely that the pre-strike employment level was 1,100 and the July 5, 1935, employment level approximately 600. It further appeared from the undisputed proof, and (as heretofore noted) is now undisputed even by petitioners, that following the strike in 1935 the employment level never rose to its former peak existing before such strike. The Board, as a result, held that all of the pre-strike employees could under no circumstances have been reinstated, irrespective of whether such pre-strike employees were Union or non-Union members, claimants or non-claimants (R. 132 *et seq.*). There is no dispute but that this conclusion was and is true. In order, therefore, to meet the argument of respondents that, under such admitted facts (admitted then and now), there was no showing that any particular claimant would, absent any conceivable discrimination, have been rehired, the Board conceived a remedy designed to compensate the claimants upon a fractional basis (141 F. 2d, l. c. 844). The claimants number 209, and the proof disclosed, the Board found, the court below found, that very shortly after July 5, 1935, there was available employment for them (119 F. 2d, l. c. 913, 914). Thus the court below in the original enforcement proceeding confirmed findings of the Board that, immediately after July 5, 1935, 364 jobs opened up, which were available for the 209 claimants (119 F. 2d l. c. 913, 914):

> "On July 5, 1935, the petitioners were operating with about 500 men. Their operations were not fully manned; and the evidence is that some men were taken on, so that by November 1, 1935, they were employing 864 men. *The Board found, justifiably that petitioners from July 5, 1935, to November 1,* 1935, had jobs available." (Italics ours).

* * * * * * *

"This Court is of the opinion that if the evidence sustains the Board's finding that the striking employees would on July 5, 1935, *or thereafter while jobs were available*, have applied for reinstatement and would have returned to work except for the illegal condition of reinstatement imposed by petitioners, the Board had authority to make an appropriate order with respect to reinstatement and back wages." (Italics ours).

Thus there was no doubt in the mind of the then Board or of the court below that immediately after July 5, 1935, there was available employment for the 209 claimants. The then Board held, however, and the court below approved the discretionary remedy thereupon improvised, that the availability of jobs for the claimants was not the issue; if there had been no discrimination as charged, all pre-strike employees would have enjoyed equal rights but *all* could not have been rehired; and that, therefore, there being no assurance that any one of the claimants would have been rehired, as against a non-claimant who was also a pre-strike employee, the claimant could at best enjoy only a proportionate, fractional back wage award. It should be stressed again that it is conceded by petitioners that this fundamental premise of the Board remedy is true; it is not claimed that the post-strike employment level ever rose to the pre-strike employment level. This order of the Board was enforced by judicial decree over the vigorous opposition of these respondents. No possible deception on the part of respondents, or misconception of the employment situation on the part of the Board, was or could be shown.

Respondents challenged the sufficiency of the Board pleading, and categorically denied, by verified averments, the factual allegations. Respondents contend that this

final decree could *at most** only be vacated by pleading and proof satisfying the recognized requirements of a bill of review, and: (1) that the Board petition failed to state a cause of action, as a purported bill of review, since (a) no fraud was alleged, but at most inadvertent withholding of information in an adversary proceeding, (b) more particularly, no extrinsic fraud was alleged, (c) no newly discovered evidence was alleged (all facts relied upon by the Board appearing in the record before the Court), and (d) the affidavits required for a bill of review were not filed; (2) that the allegations of the Board petition were affirmatively negatived by the record before the Court, and by the findings of the Board and the Court in the original enforcement proceeding; (3) that no motion for judgment on the pleadings, in view of the verified categorical denials in the answer, could be entertained. After argument the motion for judgment on the pleadings was denied and the Board petition dismissed with opinion filed (R. 307). The Board thereupon filed a petition for rehearing (R. 313), and petitioners filed a motion to modify the decree or to remand the cause to the Board (R. 327). The latter motion was in the nature of a supplement to the Board's motion for judgment on the pleadings, and was predicated upon the theory that, without hearing or trial, the final decree should forthwith be modified or remanded to the Board to the end that the latter should so modify it (R. 341). It should be noted that the Board petition below was bottomed up-

*The court below was exercising, in the enforcement proceeding, an exclusive statutory jurisdiction. By the statute creating that jurisdiction, thus exercised, it is provided that the judgment and decree of the Court, in an enforcement proceeding, "*shall be final*" subject only to timely review upon writ of certiorari or certification. 29 U. S. C. A., Sec. 160, p. 239. Hence by explicit statutory provision the finality of such a judgment and decree is immune from attack even by a bill of review.

on the theory that its predecessor, in the final order, had misconceived the factual employment situation by reason of the alleged "inadvertent withholding" of information by respondents. After the opinion of the Court, holding that there was no factual basis for that contention, was filed, petitioners for the first time, in their motion to modify, abandoned the theory of deception and based their claim to relief upon the plain assertion that the Board, in drafting its remedy, had been guilty of unilateral error. Petitioners did not purport to file affidavits showing that such error had actually occurred; their contention was that, as a matter of law, the error was manifest upon the face of the Board order. In their motion petitioners offered no excuse for their failure to seek correction of such allegedly palpable error at the time the Board order was filed and in accordance with the statutory procedure provided. Both the petition of the Board and the motion of petitioners were denied on May 17, 1944 (R. 343). The Board did not seek certiorari. Petitioners did so.

F.

ARGUMENT.

Foreword.

This is an anomalous and paradoxical proceeding. In the past unsuccessful litigants have on occasion sought to vacate adverse decrees; here the successful litigants seek to vacate in part the favorable decree which they joined in inducing the court below to enter. With that decree, in its entirety, ~~petitioners~~ respondents have complied, or sought to comply. As a result no restoration of the *status quo* is possible. The injunctive proceedings of the decree have been entirely satisfied; the claimants have been restored to their employment; thousands of dollars (*e. g.* to Sheppard, to Rayon) have been paid out under this back-wage award. The period of alleged discrimination, limiting any back-wage award, ended on August 23, 1941 (Pet. Br. p. 14). Hence the requested modification of the decree would necessarily have a retrospective, and not a prospective, operation; it would control not the future but the past. With the lapse of time, moreover, rights of respondents (*e. g.* certiorari) have been irretrievably lost. The only professed purpose of the Union proceeding is to authorize the Board to revise its discretionary remedy, after rights and liabilities had become fixed thereunder, in order to render it more punitive against respondents. The exercise of that discretion had in the interval become a finality by judgment. There must be an end to litigation, and this is particularly true in actions involving employer-employee relationships.

The general rule that a judgment or decree becomes final upon the ending of the term cannot be challenged. This rule in the instant proceeding is fortified by the precise statutory provision that the court below, on a re-

view and enforcement proceeding, exercised an exclusive jurisdiction, and that its judgment and decree should be final, subject only to timely review thereof upon certiorari. National Labor Relations Act, 29 U. S. C. A., Sec. 160, p. 239. Only under rare and extraordinary circumstances will such a final judgment or decree be reopened or reviewed. Thus Mr. Justice Holmes remarked (*Delaware R. R. v. Rellstab*, 276 U. S. 1, 72 L. Ed. 439, l. c. 441):

> "The witnesses who had testified for the plaintiff at the first trial testified for the defendant at the second, and after the term of the district court in which the foregoing steps had been taken had expired without being extended in any form, the husband made an affidavit showing that his testimony at both trials was false and that in fact he knew nothing about the matter. The trial judge was applied to, and after hearing testimony in open court he made an order on May 9, 1925, purporting to set aside the judgment that had been affirmed by the circuit court of appeals during a previous unextended term. The petitioners thereupon applied to the circuit court of appeals for a writ of mandamus to reinstate the judgment, but the circuit court of appeals held that it had no jurisdiction to grant the writ. 15 F. 2d 137. A writ of certiorari was granted by this court. 273 U. S. 685, 71 L. Ed. 840, 47 Sup. Ct. Rep. 247.
>
> "However strong may have been the convictions of the district judge that injustice would be done by enforcing the judgment, he could not set it aside on the ground that the testimony of admitted perjurers was perjured also at the second trial. The power of the court to set aside its judgment on this ground ended with the term. *Re Metropolitan Trust Co.*, 218 U. S. 312, 320, 54 L. Ed. 1051, 1054, 31 Sup. Ct. Rep. 18. As the court was without jurisdiction to vacate the judgment mandamus is the appropriate remedy unless to grant that writ is beyond

the power of the circuit court of appeals. *Re Metropolitan Trust Co.*, 218 U. S. 312, 321, 54 L. Ed. 1051, 31 Sup. Ct. Rep. 18. We perceive no reason to doubt the power of that court. It had affirmed the judgment of the court below. *Brown* v. *Alton Water Co.*, 222 U. S. 325, 332, 56 L. Ed. 221, 224, 32 Sup. Ct. Rep. 156. Like other appellate courts (*Re Potts*, 166 U. S. 263, 41 L. Ed. 994, 17 Sup. Ct. Rep. 520), the circuit court of appeals has power to require its judgment to be enforced as against any obstruction that the lower court, exceeding its jurisdiction, may interpose. *McClellan* v. *Carland*, 217 U. S. 268, 54 L. Ed. 762, 30 Sup. Ct. Rep. 501. The issue of a mandamus is closely enough connected with the appellate power."

Similarly (*Nachod et al.* v. *Engineering Corp.*, 108 F. 2d 594):

"Our term having expired since the mandate went down, we have no power to recall it. *Bushnell* v. *Crooke Mining & Smelting Co.*, 150 U. S. 82, 14 S. Ct. 22, 37 L. Ed. 1007; *Scotten* v. *Littlefield*, 235 U. S. 407, 35 S. Ct. 125, 59 L. Ed. 289; *Watts, Watts & Co.* v. *Unione*, 2 Cir., 239 Fed. 1023; *Dobson* v. *United States*, 2 Cir., 31 F. 2d 288. Rule 6(c) of the Rules of Civil Procedure for District Courts, 28 U. S. C. A. following section 723c, does not apply to Circuit Courts of Appeals."

Further (*United States* v. *Throckmorton*, 98 U. S. 61, 25 L. Ed. 93, l. c. 95):

"If the court has been mistaken in the law, there is a remedy by writ of error. If the jury has been mistaken in the facts, there is the same remedy by motion for new trial. If there has been evidence discovered since the trial, a motion for a new trial will give appropriate relief. But all these are parts of the same proceeding, relief is given in the same suit, and the party is not vexed by another suit for the

same matter. So in a suit in chancery, on proper showing, a rehearing is granted. If the injury complained of is an erroneous decision, an appeal to a higher court gives opportunity to correct the error. If new evidence is discovered after the decree has become final, a bill of review on that ground may be filed within the rules prescribed by law on that subject. Here, again, these proceedings are all part of the same suit, and the rule framed for the repose of society is not violated.

"But there is an admitted exception to this general rule, in cases where, by reason of some thing done by the successful party to a suit, there was, in fact, no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. See Wells, Res Adjudicata, Sec. 499; *Pearce* v. *Olney*, 20 Conn. 544; *Wierich* v. *De Zoya*, 7 Ill. (2 Gilm.) 385; *Kent* v. *Ricards*, 3 Md. Ch. 396; *Smith* v. *Lowry*, 1 John's. Ch. 320; *DeLouis* v. *Meek*, 2 Greene (Iowa) 55."

* * * * * * *

"On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was

actually presented and considered in the judgment assailed."

The rigorous enforcement of this rule is indicated in *Bronson* v. *Schulten*, 104 U. S. 410, 26 L. Ed. 797, l. c. 799;

> "But it is a rule equally well established, that after the Term has ended, all final judgments and decrees of the court pass beyond its control, unless steps be taken during that Term, by motion or otherwise, to set aside, modify or correct them, and if errors exist they can only be corrected by such proceeding by a writ of error or appeal as may be allowed in a court which, by law, can review the decision. So strongly has this principle been upheld by this court, that while realizing that there is no court which can review its decisions, it has invariably refused all applications for rehearing made after the adjournment of the court for the Term at which the judgment was rendered. And this is placed upon the ground that the case has passed beyond the control of the court. *Brooks* v. *R. R. Co.*, (*ante*, 91); *Public Schools* v. *Walker*, 9 Wall. 603 (76 U. S., XIX 650); *Brown* v. *Aspden*, 14 How. 25; *Cameron* v. *McRoberts*, 3 Wheat. 591; *Ex parte Sibbald* v. *U. S.*, 12 Pet. 488; *U. S.* v. *Glamorgan*, 2 Curtis 236; *Bradford* v. *Patterson*, 1 A. K. Marsh. 464; *Ballard* v. *Davis*, 3 J. J. Marsh. 656)."

To the same effect: *Wetmore* v. *Karrick*, 205 U. S. 141, 51 L. Ed. 745. In a recent authority, wherein an attempt was made to modify a final decree in a National Labor Relations Board proceeding the court remarked (*Stewart Corp.* v. *National Labor Relations Board*, 129 F. 2d 481, l. c. 483):

> "In determining what is our authority in this and like cases, which are arising constantly now, we are first confronted by the rule of law, that a court has no jurisdiction to modify its final order after the expiration of the term at which it was entered. The

Supreme and inferior Federal courts have so held countless times."

* * * * * * *

"But these rules, whatever their scope, have no application to the Circuit Court of Appeals (*Nachod et al.* v. *Engineering Research Corp.*, 2 Cir., 108 F. 2d 954, holding specifically Rule 6 (c) does not apply to C. C. A.), and therefore the loss of jurisdiction with the ending of the term at which the order was entered, still applies unchanged to this court's judgments and decrees."

* * * * * * *

"We are aided in the decision of this case by the very apt and enlightening opinion of the Court in *United States* v. *Swift & Co.*, 286 U. S. 106, 52 S. Ct. 460, 462, 76 L. Ed. 999. It involved a consent decree of injunction in a suit by the United States under the Sherman Anti-Trust Act, 15 U. S. C. A., Secs. 1-7, 15 note, by which decree a monopolistic combination of meat packers was dissolved, and the individual units were enjoined from trading in certain foodstuffs outside the meat industry. The packers alleged that changed conditions in the food industry warranted a modification of the decree.

"The Court drew the very logical distinction between injunctions, executory in nature which might, under limited conditions, be modified, and injunctions predicated upon rights fully accrued which could not be subsequently changed.

"We quote from this opinion:

"* * * Power to modify the decree was reserved by its very terms, and so from the beginning went hand in hand with its restraints. If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is

subject always to adaptation as events may shape the need. * * *

"The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative. * * *"

"Our conclusion is, therefore, that while we are without authority, ordinarily, to modify our final decrees after the expiration of the term at which they are entered, there is, as there must be, an exception to this rule, applicable alike to this, as to District Courts. This exception recognizes in us the power to modify any part of a decree which has become inapplicable by reason of changed conditions and circumstances arising subsequent to its entry."

There is no pretense in the instant proceeding that the action of Board or Union is attempted because of any change of conditions subsequent to the entry of the decree.

The fundamental vice underlying every contention of petitioners is that their request for modification of the final decree would result in a decree, prospective in operation only and dealing with future rights, rather than a decree retrospective in operation and dealing with past accrued rights. In seeking vacation of the final decree petitioners deal not with the future but with the past. They concede that "the terminal date of the 6-year period of discrimination which had begun July 5, 1935," was August 23, 1941 (Pet. Br. p. 14). As a result rights and liabilities under the final decree were fixed and fully accrued upon that date. To accede to the relief sought by petitioners would not be to modify a decree, applicable *in futuro*, for prospective operation after such modifica-

tion, but to vacate, nullify and set aside a final decree as of the date of its original rendition. That can be done, if at all, only by compliance by pleading and proof with the essentials of a bill of review. Petitioners do not contend that either they or the Board thus complied in the proceeding below; to the contrary they boldly assert that such compliance was unnecessary, that the doctrine of finality of judgment has no application to a final decree in an enforcement proceeding, and that the Board, after the final decree, had plenary authority to disregard, vacate, or modify that decree without application to the Court for permission to do so. They go further: they assert, without equivocation, that when the Board represents by a pleading to the Court which, at its instance, entered the decree which in the interim has become final, that facts have been discovered or their significance for the first time recognized (although appearing in the original record and fully known to all parties litigant), which in the opinion of the Board justify administrative modification of the final decree, those *ex parte* representations must be accepted by the Court as conclusive findings of fact, and the decree vacated and remanded to the Board for modification without right on the part of the Court to determine whether there is any legal or factual basis therefor. The final contention of petitioners is even more extreme: that if, years after a final decree, an interested union asserts that the Board order and the decree contain upon their face an evident and palpable inadvertent error, although that union joined in the procurement of the decree and failed to exercise its remedy by review, the Court must, without hearing or trial, correct the claimed error by rewriting the final decree or remanding that decree to permit an administrative agency to rewrite it on its behalf. The plain answer to these contentions is that no Court has jurisdiction to vacate a final judgment deal-

ing with accrued rights, except at most upon a bill of review; and no court has authority to delegate control over its processes to an administrative agency.

The questions presented here (Pet. Br. p. 2) were not presented below and were not involved there. They are novel here. We do not understand petitioners to contend that, if the proceeding below was in the nature of a bill of review, and the doctrine of finality of judgment applied to the final enforcement decree, the ruling below, that there was no factual basis therefor, was erroneous or is here reviewable. To the contrary petitioners contend that the doctrine of finality of judgment did not apply; that no proceeding in the nature of a bill of review was necessary, and that exclusive authority was vested in the Board as an administrative agency to control the decree with the right to vacate it or modify it. In fact petitioners suggest that the Board was ill-advised in filing the proceeding below even as a courteous gesture, and that in any event that Court was without jurisdiction or authority to determine whether there was legal or factual basis for the modification sought, and was compelled as an automaton to delegate that control over its own decree to the administrative agency. This theory of petitioners is a complete departure from the theory below, where the doctrine of finality of judgment was conceded, and where the Board unsuccessfully sought to defend its proceeding as in compliance with the requirements of a bill of review. Thus when the decision below did not involve the questions presented here, or require their decision, certiorari should be revoked. *U. S. v. McFarland*, 275 U. S. 485, 72 L. Ed. 386; *Dent v. Swilley*, 275 U. S. 492, 72 L. Ed. 390. As this Court remarked in the latter authority, the grounds which were presented in the petition for certiorari, because of which the writ was granted, do not prove to have a substantial

basis in the record. An analysis of the questions presented will sustain this statement. Thus petitioners submit (*first question presented*) that the court below was precluded from going behind the representations of the Board, seeking to vacate and remand a portion of the decree, to determine whether there was a legal or factual basis therefor; in other words petitioners now assert that when the Board in the proceeding below represented to the court that it had determined "from facts appearing for the first time during its compliance investigations" that the decree should be modified to achieve the relief intended, vacation and remand were mandatory, the court could not "appraise" the evidence or the decree, and that the function of such appraisal was vested exclusively in the Board. Neither Board nor petitioners made such a contention below; to the contrary they *sought* the judgment of the Court upon this particular issue; and now assail the court below for determining the issue which they presented and upon which they invoked its jurisdiction. Similarly it is suggested (*second question presented*) that claimed palpable error manifest upon the face of the original Board order, inadvertent, intended, or otherwise, which under appropriate procedure could have been reviewed in the enforcement proceeding, compelled vacation or nullification of the final judicial decree entered, and that the court below was compelled, as a matter of law, *eo instante*, upon the mere motion of the Union and the back-wage claimants; containing a representation to that effect, thus to vacate, annul, or modify its final decree without right, authority or jurisdiction on its part to investigate the propriety thereof upon either a legal or a factual basis. Such was not the position of petitioners below; there petitioners' motion purported to be in confirmation and supplement of the Board proceeding in the nature of a bill of review (R. 337). Finally

(*third question presented*) petitioners assert that the decree, entered by the court below at the instance of the Board and the Union, was unsupported by factual proof, and predicated exclusively upon conjecture and hypothesis, and that the court below, as a result, was under the mandatory duty of vacating that decree at the request of Board or Union, years later, and either rewriting it to conform to the reconsidered opinion of the Board and Union or remanding it to the Board to the end that that administrative agency should thus alter its judicial decree. No such contention was made below. The questions presented are therefore not reviewable, and, since review is restricted to proper questions actually presented in the application for the writ, certiorari should be revoked and review herein denied. *General Talking Pictures Corp.* v. *Western Electric*, 304 U. S. 175, l. c. 177, 178, 82 L. Ed. 1273, l. c. 1275; *Helis* v. *Ward*, 308 U. S. 365, 84 L. Ed. 327, l. c. 329; *Dickinson Industrial Site* v. *Cowan*, 309 U. S. 382, l. c. 389, 84 L. Ed. 819, l. c. 825.

Petitioners indulge in a purported statement of facts which is utterly unsupported by the record. The principal record citations are to the averments appearing in the pleadings of Board and Union below; the few remaining, consisting of mere lines, even words, of the certified typewritten record are torn from context. Equally are lines, and even words from briefs (never incorporated in the record or in any bill of exceptions) torn from context. Thus petitioners boldly urge that respondents claimed that employment was unavailable to the claimants because other old employees had successfully reapplied for work, and that they further urged that the reduction in the employment level left a number of jobs which were insufficient for the claimants and other pre-strike employees applying therefor (Pet. Br. p. 7). That is untrue. We shall deal hereafter, demon-

strating its falsity, with the assertion that the exceptions filed challenged the sufficiency of employment possibilities. (Pet. Br. p. 8). The Board never assumed, in its original order, that "there were not enough jobs available for all claimants and other old employees desiring to return after the strike". (Pet. Br. p. 9). The Board equally never assumed that "there were and could continue to be at all times less jobs open than old employees available" (Pet. Br. p. 11). When petitioners charge that given evidence of respondents is "untrue" (Pet. Br. p. 16), their record references relate to their own or Board pleadings and not to evidence in the record. The Board "estimates" of the full wages lost by the claimants are unexplained, are unsupported by any proof whatsoever (Pet. Br. p. 17). The answer of respondents never admitted the truth of the assertion that on or after July 5, 1935, there were employment possibilities for all claimants and all other pre-strike employees (Pet. Br. p. 18). We have heretofore noted that it is conceded that the post-strike employment level never reached the pre-strike employment level. While we conceive that petitioners do not contend that the factual decision below was improper (upon the ground that that decision, which the Board and petitioners sought from the Court, was an invasion of the exclusive province of the administrative agency), we propose to document the record to demonstrate that the averments below by Board and Union were false, and so shown by the proof appearing in the record filed before the Court. Thus:

The Theory of the Board Below.

The Board purported to base its proceeding upon two assertions: *First*, that respondents at the hearing of the cause, and thereafter, opposed reinstatement or any award of back wages upon the evidentiary representation

that after July 5, 1935, available jobs were fewer than the number of claimants, or, alternatively, fewer than the combined number of claimants and pre-strike employees (non-claimants) who reapplied therefor; and, *secondly*, that the then Board understood, and found, the foregoing claimed representation to be true, accepted it as the premise for its discretionary remedy, and embodied it in the formula thereupon contrived. Neither assertion could be sustained; both assertions were affirmatively negatived by the record proof. Their insufficiency in law, moreover, as the basis for an attack upon the finality of the decree was self-evident. If the issue in question had been litigated, judgment thereon was final and conclusive; if it has not been litigated, the Board was not misled.

It will be noted that there was no claim of fraud or perjury. The charge by the Board pleading was reduced to the innocuous level of inadvertent non-disclosure; and this was disproved by the record. It is, moreover, a novel doctrine to suggest that respondents in an adversary proceeding were under any legal duty of disclosure. If, however, there had been a representation made, as charged, the Board could cite the record to support the argument; this it failed to do. Petitioners cannot do so. If there had been concealment, the Board could have pleaded the facts thereof; this it failed to do. Petitioners cannot do so. If the Board, misled as is claimed, found such an asserted representation to be true, the final order, or the record evidence, could be specified in confirmation; this the Board failed to do. Petitioners cannot do so. In fact the findings of the Board are unambiguously to the contrary. The charges made were plain conclusions unsupported by proof.

It is undenied (as the record discloses) that all records of respondents were made available at all times to

the Board. Counsel for the Board took advantage of this opportunity; payrolls were exhaustively examined both by counsel and by Union representatives; the record evidence of labor operations, succeeding employment levels as disclosed by the records, were subjected to detailed scrutiny. Board exhibits, Board findings, disproved the Board allegations below. Deception was impossible, and the record conclusively negatived any attempt to deceive. The Board remedy was assailed by respondents as arbitrary and unsupported by evidence, and was approved by the court below at the vigorous instance of the Board as within its discretionary powers. Such remedy is now (*semble*) disapproved by petitioners as insufficiently rigorous. The circumstance is entirely ignored that the then Board, upon the basis of its findings, was vested with discretion to award *no* back wages; whether it ordered reinstatement under the powers conferred upon it by the Act, with or without back wages, was unmistakably discretionary. If it chose not to exercise such discretionary powers to their full rigorous and punitive limits, that choice cannot be now challenged or reviewed. Present dissatisfaction by the present Board with its predecessor's discretionary remedy cannot justify its vacation in part or the disregard of the doctrine of finality of judgment or the revesting in the present Board of jurisdiction further to penalize respondents. If that remedy had proved more prejudicial to respondents than planned, in the estimation of the Board, respondents would plainly have been without remedy. The situation in ultimate effect is that the then Board, without fraud or deception, prescribed a discretionary remedy; the present Board regards that discretionary remedy as insufficiently onerous; the latter, therefore, seeks to induce this Court to authorize it to nullify its predecessor's act, its predecessor's exercise of discretion, although it had be-

come final by judicial decree, to the end that a different and more rigorous remedy may now be devised. If such procedure were possible there could be no finality of judgment, and every change of administration could result in a review, and reconsideration, of the judicially concluded acts of previous personnel. Certainty in litigation would disappear.

The Board misconceived the nature of the issues litigated and the defenses made in the original proceeding. Thus the availability of work for the claimants, or for the claimants and reapplicants, was never challenged by respondents. In fact the category or classification "reapplicants" (i. e., men employed on May 8, 1935, other than claimants, who, after July 5, 1935, reapplied for employment) was unknown at the hearing; it was first created in connection with the governing proportion in the formula initially appearing in the final order of the Board. The defense of respondents against the charge of discrimination (as documented hereafter from the record) was not that there was insufficient work to afford employment for all claimants, but that respondents had repeatedly urged them to return to available employment, that they refused, and that their subsequent unemployment resulted not from any act of respondents, not from any insufficiency of employment opportunities, but from their unwillingness to work absent the granting of an admittedly illegal condition. This was the defense at the hearing; this was the defense in oral argument; this was the defense before the court on enforcement proceedings. Curtailment of employment opportunities, reduction in the employment level, following the strike (conceded by the Board and petitioners to have occurred) entered the defense only upon this legal basis: That even if sufficient employment was available for all claimants, even if respondents had

urged the claimants to accept such available employment, as the undisputed proof revealed, a particular claimant could not legally be compulsorily reinstated if his former job, by reason of the sale of properties, change of operations, or other cause, had been in good faith eliminated. In other words respondents contended (and such alone was their evidence) that particular jobs of particular claimants had disappeared; that no man could, as a matter of law, be compulsorily *reinstated* to a position then nonexistent; and that, therefore, as to specified particular claimants, even if *other* work was available, reinstatement to such nonexistent jobs was a legal impossibility. The then Board clearly understood that contention which involved no representation that employment of some character was factually unavailable; in fact the Trial Examiner accepted and approved this legal contention in the Intermediate Report and denied reinstatement to such particular claimants whose particular positions had thus disappeared (Intermediate Report, pars. 101, 102, 115, 116, 117, 118, 119). A reference to the final order of the Board reveals unmistakably both the clarity of its understanding of the contention made by respondents and, as well, the falsity of the suggestion of the present Board that it was deceived into believing that (distinct from the legal position of respondents that no man could be reinstated if his former position had disappeared) employment was not available after July 5, 1935. In fact the Board found, and the court below in its opinion specifically approved the finding, that on and after July 5, 1935, full employment for all claimants *was* available. Hence even if petitioners had represented the contrary (which they did not) neither the Board nor the court below was deceived.

The Board Findings in the Original Order.

The facts relating to the elimination of particular jobs of particular claimants were submitted to the Board in the form of a factual brief. That the Board clearly understood the theory of respondents (as heretofore discussed) appears from its order:

> "The Trial Examiner's recommendation for the dismissal of the complaint in so far as it alleged discriminatory discharge or refusal to reinstate pertained in general to the following categories of employees: * * * (3) those employees who were engaged on May 8, 1935, the time of the strike, in occupations which at the conclusion of the strike had been abolished * * *."
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> * * * * * * *
>
> "The respondents contend that, for various reasons, they reorganized their business during the strike and that, as a result, many of the jobs existing on May 8, 1935, were no longer available after the return to work. The evidence shows that certain mines, such as the Tulsa-Quapaw and Grace B mines were sold before July 5, 1935, and were not operated by the respondents thereafter; that shortly after the strike, the National Industrial Recovery Act, under which the respondents were operating a 40-hour week, was declared unconstitutional by the United States Supreme Court, and that on resumption of work, the respondents returned to a 48- or 56-hour week, thereby dispensing with many jobs; and that changes in operations after May 8 and before June 15 ended a miscellany of other jobs. The Trial Examiner found that certain employees claimed by the respondents to have been engaged at such jobs on May 8, 1935, were not discriminated against since on and after July 5, 1935, their jobs had been abolished and work was no longer available to them. To these findings and conclusions the International has excepted, and we find merit in such exceptions."
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> * * * * * * *

"Under all the circumstances we do not believe that the respondents have shown that the jobs of these particular claimants have disappeared, but rather only that certain work was curtailed. A legitimate curtailment of work does not, however, necessarily justify exclusion of the claimants from consideration for the jobs remaining. The evidence shows that not actual job disappearance but membership in the International and failure to obtain a blue card were the real reasons for the failure to reinstate this group of men."

* * * * * * *

"Under all the circumstances, we find that the respondents have failed to show that the claimants coming within this category would in any event have been refused reemployment, absent illegal conditions."

In view of these findings how could the Board or petitioners contend that the then Board understood that respondents were resisting the reinstatement of *all* claimants upon the theory that a general curtailment of operations had reduced available employment below the level of the number of claimants or of claimants and reapplicants? It is plain that the Board understood that this legal defense was directed against the compulsory reinstatement of those particular claimants whose former positions had been eliminated. When the Board, moreover, found that an illegal condition of employment was the true cause for the failure to reinstate these particular claimants on July 5, 1935, by inevitable implication it found that positions for such claimants were then open and available. We refer to the finding of the Board, and of the court below, in the original enforcement proceeding, heretofore reviewed, as negativing the contentions now made by petitioners (*supra*, pp. 21, 24).

Prior to the institution of the present attempted proceeding no issue had ever been raised, no evidence had ever been introduced, as to the number of reapplicants, or the availability of employment for the combined number of claimants and reapplicants. The order, as quoted (*supra*, pp. 21-24), effectively disposes of the present claim of petitioners that the Board then understood that employment for such combined number was unavailable. Counsel for petitioners in this proceeding consistently assume that the claimants numbered approximately 200; at the time of the hearing, however, the claimants numbered approximately 350 (R. 132). In addition to the latter number others were claimants during the hearing but dismissed during its progress (Intermediate Report, par. 114). These claimants refused to return to their employment because, according to the Board, of the imposition of an illegal condition. If, as the Board urged, the initial 400 to 600 men reemployed were overwhelmingly former employees, if, as the Board found, there were only approximately 1,100 employees of respondents at the time of the strike (R. 132), and if from 350 to 400 claimants, pre-strike employees, were admittedly unwilling to work, it is very apparent that the reservoir of other pre-strike employees, possibly available for reemployment, had shrunk almost to the vanishing point. Hence when the Board found that 366 jobs opened up during the period from July 5, 1935, to November 1, 1935, and was thoroughly cognizant from the labor survey (Board Exhs. 260, 261, 262) of the increases in employment thereafter from 1935 to 1938, it becomes a monumental absurdity to contend, without evidence, without any representation shown, without any finding by the Board to that effect, that the latter "understood" that there were throughout this long period insufficient jobs for the combined num-

ber of successful claimants (approximately 200) and reapplicants (employees of May 8, 1934, non-claimants, applying for reemployment after July 5, 1935). The Board, of course, made no such finding and expressed no such understanding. Its understanding, even though the number of reapplicants was never at issue or material under the final order, was obviously and necessarily to the contrary.

It will be recalled that upon the initial reopening of respondents' properties, *prior* to July 5, 1935, those reemployed were overwhelmingly pre-strike employees. The Board below urged that it understood at the time of its final order that *after* July 5, 1935, the same situation prevailed. Its own finding negatives the contention. Thus it found that on July 5, 1935, out of a total employment of from 500 to 600 men, 154 were *not* employed by respondents at the time of the strike. This is now conceded by petitioners (Pet. Br. pp. 9, 10, n. 3).*

The Board in its original order, moreover, found explicitly that work was available throughout 1935 despite the employment of a number of new men. Thus:

> "These cards were, of course, made out on the assumption that those for whom they were issued would work, and *that, therefore, work would be available.* Campbell testified that the fact that a rustling card was made out meant that a person was 'fully entitled' to reemployment, and further that such cards were given, after the plants resumed operation, *to every man who applied for them.* Campbell stated that he could not recall a single

*The statement (Pet. Br. p. 10, n. 3) that the Board projected this perspective throughout the entire period of discrimination is plainly untrue. Thus the Board found that operations thereafter continued to expand, and that 366 new jobs opened up, available to the claimants, before November 1, 1935 (*supra*, pp. 21-34).

instance' in which a rustling card was refused until the end of 1935."

Upon the basis of this finding the then Board held that there was available employment even for those claimants whose particular jobs had disappeared. *A fortiori* this necessarily implied that there was available employment for those claimants whose jobs had not disappeared.

We turn now to the Board remedy to demonstrate that there is not the slightest suggestion that the Board, by reason of representations, non-disclosure, or otherwise, understood that after July 5, 1935, there were insufficient jobs opening up for the successful claimants, or, alternatively, for the combined number of such claimants and reapplicants. We have noted *supra* that such a claimed understanding was impossible in view of the explicit finding of the Board that jobs to the number of 366 came into being after July 5, 1935, and before November 1, 1935. Thus (R. 131):

"All, or such number as may be necessary, of the employees presently working for the respondents who were hired after July 5, 1935, the date on which the conditions of employment imposed by the respondents became illegal, and whose names do not appear on the pay rolls for the week including May 8, 1935, or were not employed by the respondents during the period between that date and July 5, 1935, shall be dismissed, to provide employment for those to be offered and who shall accept reinstatement.

"If thereupon, despite such dismissal, there is not sufficient employment immediately available for all of said employees to be offered and who shall accept reinstatement, all available positions, if any, shall be distributed among such employees, with-

out discrimination against any employee because of his union affiliation or activities, following such procedure and system of employment as has heretofore been applied in the conduct of the respondents' businesses."

It thus appears that the Board made the primary assumption that there were sufficient men hired after July 5, 1935, to render available sufficient jobs for *all* claimants. Thereafter the order considers the *possibility* only that sufficient openings would not be available.

Further (R. 132):

"Our order in the present case is designed to achieve the same objective, but the peculiar factual situation here presents unusual difficulties in fashioning our remedy so as to restore the *status quo*. Thus, there were approximately 1,100 employees working for the respondents on May 8, and by July 5, 1935, only approximately 600. *Of the 500 not working then, some 350 are claimants in this case, and we have found discrimination as to about 200.* We have found that after July 5, 1935, a substantial number of additional men were put to work, but it is apparent from the record that the total pay roll fell a good deal short of the 1,100 figure obtaining before the strike. Thus we have the following situation: had the respondents acted lawfully in restaffing their force, there is no certainty that all the claimants found to have been discriminated against would have returned to work, *since there were presumably at all times less jobs open than old employees available.* It is certainly fair to assume, on the other hand, that a large number of the claimants discriminated against would have returned, but here, again, we cannot tell which ones. It does not appear from the record that the respondents followed any set standards, such as seniority, in taking the

men back. It does appear that, as to most positions, one applicant would be as well qualified as another, since no special skills or abilities are ordinarily necessary. The only discernible standards used seemed to be two: a requirement of a blue card, and 'first come, first served.' On this state of the facts, we have no way of knowing which men would have been reinstated had the respondents acted legally—*how many non-claimants, how many claimants whose cases we are dismissing, how many claimants whose cases we are sustaining.*"

* * * * * * * *

"A lump sum shall be computed, consisting of all wages, salaries, and other earnings paid out by the respondents to all persons hired or reinstated from and after July 5, 1935, up to the date on which the respondents comply with our order reinstating or placing on a preferential list the claimants discriminated against. The lump sum shall consist of all such monies so paid to such person during the period set forth in the preceding sentence. For the reasons indicated above, we shall not credit the entire lump sum to the claimants discriminated against, since we cannot assume that they and only they would have been given these jobs had the respondents acted lawfully. But we can and do assume for this purpose that a proportionate amount of such claimants would have been given the jobs. In establisning the governing proportion, we shall divide the number of claimants discriminated against by that same number plus the number of other employees on the respondents' pay rolls of May 8, 1935, who applied for work after the respondents, whether successfully or not, after July, 1935. Let us assume for purposes of illustration that the lump sum amounts to $360,000, that there are 200 claimants discriminated against, and that there are 100 other employees on the May 8, 1935, pay roll who applied after July 5, 1935. Thus we assume that two-thirds of the number of jobs would have gone to claim-

ants discriminated against, had the respondents acted lawfully, as jobs were filled. This, we think, is as close as it is possible to come to reconstructing the probable situation, absent the respondents' discrimination. Still using the illustrative figures, two-thirds of the lump sum, or $240,000, would be the basic sum to be divided among the claimants discriminated against."

Further (R. 133, n. 185):

> "If at any given time during this period the number of such new or reinstated employees then working exceeds the number of claimants discriminated against, only the earnings of a number of such employees equal to the number of claimants discriminated against shall be counted in computing the lump sum. In such a case the respondents shall not select any particular new or reinstated employees for exclusion from the computation, but shall take the average earnings of all new or reinstated employees then working and multiply by the number of claimants discriminated against, to arrive at the total to be credited to the lump sum."

Petitioners argue that "the peculiar factual situation" contemplated in the order was that there were fewer available jobs than the number of successful claimants or, alternatively, than the combined number of such claimants and reapplicants. This argument is exploded by the excerpt quoted. The Board held that the "peculiar factual situation" was that the evidence disclosed that there were "less jobs open than *old* employees available." This was concededly true. The employment level following the strike was lower than the pre-strike employment level. That is admitted. It will be recalled that the Board waived any requirement on the part of the claimants to reapply for employment as a condition to proof of discriminatory refusal to reinstate. It placed all "old

employees" (those employed on May 8, 1935) upon substantially the same basis; by reason of the sale of properties, change of operations, and other considerations, the general employment level following the strike was lower than the pre-strike level; the Board necessarily pointed out that *all* pre-strike employees could not have been reemployed. *It did not assert, it did not find, it did not assume, that the approximately 200 successful claimants, and those other pre-strike employees (reapplicants) who applied for reemployment after July 5, 1935, could not have been reemployed in available work.* This latter contention by the successor Board was a plain attempt to change and distort the issue and the finding made by its predecessor. That predecessor found merely that following the strike there were not jobs available for all *old* employees; these *old* employees included the 200 successful claimants, the 150 to 200 unsuccessful claimants, non-claimants who applied for reemployment, and non-claimants who did not apply for reemployment. The distinction between the finding of the predecessor Board and the untenable contention of its successor and the petitioners, is unmistakable. The evidence disclosed that the Board found that following the strike there were not sufficient openings available for the 1,100 pre-strike employees; the evidence did not purport to show, the Board did not purport to find, that on and after July 5, 1935, there were not sufficient employment openings for the reduced category of the combined number of *successful* claimants and other pre-strike employees, non-claimants, *who applied for reemployment after that date.* The former conclusion is fortified by proof and was undenied by the Board; as to the latter conclusion, there was no such issue at the trial. As heretofore noted, however, the Board had access to all pertinent records if it had desired to raise that issue; various payrolls are in evi-

dence and others were scrutinized by Board counsel; the then Board was fully aware from such payrolls and from the labor survey of the number of men employed on July 5, 1935, and at various dates thereafter during that month; that Board was informed, through the labor survey (Board Exhs. 260, 261, 262), of the number of jobs, of the number of men employed, throughout the subsequent period up to the approximate close of the hearing in 1938. It found (as quoted *supra*) that at least 336 new men were added to the payrolls in the period from July 5, 1935, to November 1, 1935; and if the issue of the availability of jobs for the combined number of successful claimants and reapplicants had even been considered by the then Board, the latter would necessarily have known that such jobs became available, as indicated, during the summer of 1935 and thereafter substantially remained available. Any claim of deception, inadvertent or otherwise, is a patent absurdity negatived by the record proof and supported by no fact or circumstance in the record. No one can examine the excepts of the final order quoted *supra*, and the labor survey, and credit the assertions now made by petitioners.

Thus the premise for the Board formula, the peculiar factual situation found, was no more than this: that the employment level following the strike was not so high as the employment level (1,100 men) at the time of the strike. The Board did not challenge the accuracy of this finding. Manifestly no deception was involved therein. The formula was never predicated upon any assumption that after July 5, 1935, there were insufficient jobs for the combined number of successful claimants and reapplicants. It is equally true that no such doctrine was embodied in the formula devised. By that formula a lump sum was to be computed. The method of computation was dependent upon the existence of ei-

ther of two contemplated conditions: (1) During any period, when the number of persons hired or reinstated after July 5, 1935, was less than the number of successful claimants, all earnings paid them went into such lump sum; (2) during any period when the number of persons hired or reinstated after July 5, 1935, exceeded the number of successful claimants, the average earnings paid each of them, multiplied by the number of claimants, went into the lump sum. By reason of pre-strike irregularity of employment on the part of the claimants, the Board restricted them to *average* earnings of post-strike employees. The present Board ignores this. Since the formula provided for both circumstances, it is undeniable that the then Board contemplated the existence of both conditions. In point of fact, when it found, as noted *supra* (pp. 21-24), that there were at least 366 men thus hired or reinstated, between July 5, 1935, and November 1, 1935, it necessarily recognized that the second condition for the computation of the lump sum prevailed as early as the summer of 1935; its analysis of the labor survey, showing the continuity and increase of employment throughout the succeeding years, necessarily revealed that such condition continued to prevail. The criticized audit of petitioners was conducted precisely upon this basis recognized by the then Board from the inception.

It is significant that the predecessor Board, in formulating the two respective types of period, did not base either type of period upon the circumstance whether during such period the number of available jobs exceeded the number of successful claimants and reapplicants. Entirely to the contrary, in fact, the respective periods were defined and delimited upon the plain basis of whether or not the number of men employed after July 5, 1935 (irrespective of whether they were new employees or reapplicants), exceeded the number of successful claimants. The amount of the lump sum under the formula, therefore, was in no respect dependent upon

the existence or nonexistence, during a given period, of available jobs for the combined number of successful claimants and reapplicants. Whether all men hired after July 5, 1935, were new employees, or whether all men hired after July 5, 1935, were reapplicants, the lump sum computed resulted in the same figure. Let us assume, on the one hand, during a given period, that there were 200 successful claimants and 100 reapplicants, and that 250 men were hired or reinstated after July 5, 1935; let us assume, on the other hand, during a given period, that there were 200 successful claimants and 25 reapplicants, and that 250 men were hired or reinstated after July 5, 1935. In the former instance there were fewer available jobs than the combined number of successful claimants and reapplicants; in the latter instance there were more available jobs than the combined number of successful claimants and reapplicants. In both instances, however, the number of men hired or reinstated after July 5, 1935 (the material factor), exceeded the number of successful claimants. The lump sum, therefore, would be computed in the same way; the same result would be achieved, during both periods; the amount of the lump sum would be identical. Thus it is readily apparent by plain mathematical calculation, that the availability of jobs for the combined number of successful claimants and reapplicants was not a factor incorporated into the formula, and consequently is entirely immaterial in the computation of the back wage award.

The governing proportion, again, is in no sense dependent upon the circumstance whether available jobs were less than, or exceeded the combined number of successful claimants and reapplicants. It proceeds upon the theory that if all old employees of May 8, 1935, successful claimants, unsuccessful claimants, and non-claimants, had simultaneously applied for reemployment following

the strike, with or without the addition of new applicants, there would have been insufficient jobs for all; that the successful claimants enjoyed no preferential rights over the others; and that, therefore, the lump sum should be reduced by a fraction represented by the number of successful claimants as the numerator and the combined number of successful claimants and reapplicants as the denominator. The availability of jobs for the combined number of successful claimants and reapplicants, during any given period, was not a factor in the calculation of the governing proportion. A reapplicant enjoyed the same status as utilized in determining the governing proportion whether his application was successful or unsuccessful (R. 134). Thus let us assume that, on the one hand, during a given period, there were 200 successful claimants, 100 reapplicants, and 250 available jobs for which men were hired; let us assume, on the other hand, during a given period, there were 200 successful claimants, 100 reapplicants and 350 available jobs for which men were hired. In the former instance there were fewer available jobs than the combined number of successful claimants and reapplicants; in the latter instance, there were more available jobs than the combined number of successful claimants and reapplicants. This varying circumstance, however, did not affect either the computation of a lump sum or the determination of the governing proportion. In both instances the lump sum would be determined by multiplying the average wage paid by the number of claimants; in both instances the governing proportion would be two-thirds, *i. e.*, the fraction represented by the number of claimants (200) as a numerator over the combined number of claimants and reapplicants (300) as a denominator. Again is it thus demonstrated that availability of employment, or unavailability of employment, during any period, for both successful

claimants and reapplicants, was not a factor or condition incorporated in the formula, and is thus not material thereto. It is, of course, apparent that the governing proportion was not predicated upon any assumption of any given comparison between the number of successful claimants and the number of reapplicants; the number of the latter was unknown at the time of the order either to the Board or any other litigant; that proportion was intended to meet any possible, although unknown, contingency. The greater the number of reapplicants among men hired or reinstated after July 5, 1935, the less the claimants received; the fewer the number of reapplicants among men hired or reinstated after July 5, 1935, the more the claimants received. Hence if respondents had misled the Board into believing that the proportion of reapplicants among men hired or reinstated after July 5, 1935, was greater than it actually was, under the governing proportion, this operated to the prejudice of respondents. The fewer the number of reapplicants among men hired after July 5, 1935, the better the successful claimants fared, since their share of the distributable lump sum under the governing proportion was thereby increased. The plain fact of the matter is that the predecessor Board, by this formula, because the successful claimants had not in fact applied for reemployment and *all* old pre-strike employees could not have been reemployed, deliberately substituted the formula for its usual test of whether or not employment for the claimants was available after the date of alleged discrimination, viz.: July 5, 1935. *It did so although it found that such employment was thus available.* Having substituted its formula, in the exercise of its discretion, for the other and more usual test of availability of employment, such availability of employment became thereunder entirely immaterial. Thus if the employment level on July 5, 1935, was

600, but thereafter dropped to 500, or increased to 700, the decrease or increase, as such, would not affect either the lump sum or the governing proportion under the formula; the lump sum is dependent not upon employment levels, not upon the availability of jobs for the successful claimants, or for the successful claimants and reapplicants, but solely upon the number of men hired after July 5, 1935, and the wages paid them; the governing proportion, again, is not dependent upon employment levels, upon the availability of jobs for the claimants, or for the claimants and reapplicants, but solely upon the proportion of the number of successful claimants to the combined number of successful claimants and successful or unsuccessful reapplicants. The successor Board now asserts (utterly without proof in the record) that its predecessor contemplated that only for rare periods would there be sufficient employment available for both successful claimants and reapplicants; the record affirmatively negatives this assertion; but the fact remains that the Board did not base a formula upon such periods. The then Board could have contrived a formula providing for a lump sum to be created by one method during any period or periods when available jobs were fewer than the combined number of successful claimants and reapplicants, and by another method for any period or periods when the number of available jobs exceeded the combined number of successful claimants and reapplicants. *This it did not do.* Thus the issue raised by the successor Board and by petitioners is a false issue; the Board necessarily knew that after the summer of 1935 there was no question of the availability of employment; and the suggestion that it was in any respect misled is fantastic.

We have referred heretofore to the finding of the Court below in the original enforcement proceeding (119 F. 2d 903, l. c. 913, 914) that "the Board found, justifiably,

that petitioners (respondents) from July 5, 1935, to November 1, 1935, had jobs available" for the claimants, and that their return to these *available jobs* was prevented only, according to the Board, by the imposition of an illegal condition of reinstatement. In view of the foregoing how can petitioners urge that the Court below, in entering the original decree, was deceived into approving the remedy upon the theory that employment opportunities were not available? We have commented before that this remedy, as against attack by respondents on the ground that it was arbitrary and unsupported by evidence, was sustained upon the theory that it was discretionary, that the Board was the sole judge of the exercise of such discretion, and that, since the full rigorous measure of such discretion had not been exercised against respondents, the latter were not prejudiced and could not complain (l. c. 915). Under the Act the Board had authority to award reinstatement with or without back wages; if it had awarded no back wages, its successor could not complain, and petitioners could not complain; and the latter cannot now urge that, because a greater penalty *could* have been imposed, the present Board should be permitted to re-exercise a discretion whose exercise long ago became final by judicial decree.

Reference is made by petitioners to the exceptions filed by respondents (Pet. Br. p. 8). The facts are these: The Trial Examiner sustained in part the contentions of respondents that certain jobs had been abolished before July 5, 1935, and that therefore reinstatement was impossible; as to other claimants, under the facts, that contention was disallowed. To avoid interminable duplication in exceptions (there being several hundred claimants) respondents drafted a single exception which, in its various grounds, would apply to *any* claimant. The

exceptions quoted embrace two legal contentions of respondents: (1) That particular jobs of particular claimants had been eliminated, with the result that reinstatement thereto was a legal impossibility; (2) that, if a particular claimant failed to reapply for employment until after another man had been hired in his place, there could be no discrimination in refusing to reemploy him for a job already filled. The predecessor Board recognized that the exception as to a particular claimant whose particular job had been eliminated before July 5, 1935, that no employment was thereafter "available," referred to that contention (and not to any claim that work was unavailable for all claimants) in remarking (R. 100):

> "The Trial Examiner found that certain employees claimed by the respondents to have been engaged at such jobs on May 8, 1935, were not discriminated against since on and after July 5, 1935, their jobs had been abolished *and work was no longer available to them.*"

Again we stress the absurdity of suggesting that the phraseology of this exception misled the Board into believing that there was insufficient work for all claimants when such Board, and this court, affirmatively found to the contrary. Respondents urged these claimants to return, and it is an absurdity to suggest that, at the very time when they were urging them to return, they were asserting that there was insufficient work for them if they did return. The existence of available work was found by the Board; it was found by the court below in the enforcement proceeding; and petitioners cannot now be heard to claim that the Board originally was misled into believing the existence of facts contrary to the explicit Board and judicial findings.

Reference to the appendix attached to the Board's petition is necessary to avoid misconception from its misleading character (R. 231). Exhibit A in the appendix, consisting of an excerpt from the decree, is non-controversial. Exhibit B shows merely the conceded reduction in the employment levels, and the abolition of specific jobs, following the strike. Petitioners do not suggest that this evidence is false or perjured. Exhibit C, excerpts from the Board order, is non-controversial, and has been discussed heretofore. Exhibit D is of the same character. Exhibits E and F, however, are definitely inaccurate, and there is utterly no record support therefor.

It will be recalled that these exhibits are designed to show the falsity of the claimed representation by respondents (which never occurred) that on and after July 5, 1935, there was insufficient work for the successful claimants and re-applicants. Three fallacies underlie the preparation of these exhibits even if they were otherwise accurate: (1) The Board assumed that at the time of the hearing the number of claimants was the present number (approximately 200) of *successful* claimants; this assumption is untrue; in point of fact we have heretofore noted that at the hearing the number of claimants was between 350 and 400; as a result, it is a plain absurdity to suggest that respondents at the hearing, dealing with nearly 400 claimants, could anticipate, and make a representation upon the basis of, a final Board order sustaining the alleged rights of 200 only; yet the Board, in the second column of these exhibits, in listing the "number of claimants" designates not the number at the time of the hearing, but the number of successful claimants; (2) the third and fourth columns are designated "All other old employees" (*i. e.*, all other pre-strike employees of May 8, 1935). In fact, however, they include only the pre-strike employees who continued in their employment

during the strike or re-applied for employment after July 5, 1935; they do not include the following categories of pre-strike old employees: (a) unsuccessful claimants (numbering 150 to 200); (b) pre-strike employees (non-claimants) who applied unsuccessfully prior to July 5, 1935; (c) old employees who failed to re-apply for employment at any time; hence the fifth column ("number of positions necessary to give employment to all employees") is manifestly untrue as not including the excluded categories; (3) ignoring, in argument, the inaccuracy of the sixth column, to which reference has been made, the seventh column is plainly meaningless since, as noted, *supra*, the Board found, the court below found, that as early as the summer of 1935, positions were available for all successful claimants. *Yet the successor Board cited the seventh column, its conclusion, as newly discovered evidence.*

Reference is made by petitioners (Pet. Br. p. 8) to the claimed representation on December 13, 1938, that "mines are closing daily." This statement actually appears in the oral argument of counsel for examiner before the Trial Examiner on April 29, 1938. It was merely filed later before the Board in lieu of further oral argument. On either date, however, it was plainly accurate. Any examination of ore prices will disclose that such prices steadily declined during the course of 1937-38. It will be recalled that, following a trial of five months, the cause was argued on the morning after the closing of the evidence (Tr. 8184). Counsel for respondents are quoted as stating that in July, 1935, over ninety per cent of then employees were employees on May 8, 1935. The context clearly indicates that counsel (discussing the issue of strike-breaking) were referring to the percentage of old employees re-employed at the open-

ing of the respective mines, mill, and smelter. This is precisely accurate; upon such reopening ninety per cent, or more, of old employees were re-employed. Different properties opened at different times during June and early July in 1935. In the court below, by briefs, counsel for Board and petitioners sought to convert this statement in oral argument into a representation that, after July 5, 1935, ninety per cent of the employees were pre-strike employees. To do so, they necessarily omitted the concluding sentence of the argument in this connection:

> *"Such was the situation as we approach the day of July 5th when the National Labor Relations Act became effective."*

It is thus unmistakably apparent that counsel for respondents was referring to a time prior to July 5, 1935; and as to such a time petitioners do not challenge the accuracy of his statement. There was, of course, no representation or contention that after July 5, 1935 (as distinguished from the prior period), available jobs went "in the overwhelming majority of cases to old employees." The Board could not be, and was not, misled into accepting any such assumption. Board Exhibits 237, 238, 239 affirmatively show the following: (1) At the Joplin smelter, on July 5, 1935, 88.7% of employees were May 8th employees; this percentage had decreased to 84% by July 16, 1935; (2) at the Galena smelter, on July 5, 1935, 87.3% of employees were May 8th employees; and this percentage had decreased to 71.04% by July 16, 1935; (3) at the mines and the mill, on July 5, 1935, 70.39% of employees were May 8th employees; and this percentage had decreased to 69% by July 16, 1935. *In the face of Board proof to this effect petitioners could not contend that the Board understood, from the argument of coun-*

sel obviously adverting to a prior period, that after July 5, 1935, 90% of *employees continued to be May 8th employees!* This is not all. The Board did not proceed upon any such misconception of the statement of counsel, but pointed out that the payrolls of July 5, 1935, revealed that 154 men were employed who were *not* May 8th employees (*supra*, p. 47). The employment level at that time was from 500 to 600 men, as heretofore noted. Thus the Board found that on July 5, 1935, only from seventy to seventy-five per cent of employees were May 8th employees; *the Board was not misled.*

In other words, a review of the record demonstrates the complete absence of misrepresentation, concealment, or non-disclosure. All records, or other documents, of respondents were made available to counsel for the Board. That opportunity was fully utilized; counsel for the Board repeatedly admitted that they had enjoyed such complete access to all records of respondents requested. Upon the issue of availability of work, moreover, the undisputed proof revealed that on and after July 5, 1935, respondents were urging the claimants to return to their former employment. It was the Union, and not respondents, which precluded such return. Thus Wilson, Vice-President of the International Union, testified that Potter asserted that the *strike* was "keeping three or four hundred men" from going back to work (Tr. 83). Berry, similarly, testified that Potter proposed that all claimants return to work on July 16, 1935 (Tr. 2618). It is ridiculous to suggest that respondents were contending both that they had invited all claimants to return to their employment and, also, that they had precluded such return upon the theory of unavailability of work.

Counsel for the Board conceded the good faith of respondents in producing any record or document requested

(Tr. 225). Counsel for respondents readily offered the production of any records required (Tr. 338, 339). Counsel for the Board paid tribute to the "cooperation" from respondents, remarked that it had been unnecessary to invoke "the spirit of a subpoena in the proceedings," and continued that he had been "unaware that counsel would prove so cooperative" (Tr. 524). The Board evidence further revealed that respondents were willing to re-employ all claimants, and that their unemployment resulted from the action of their Union in preventing them from returning to available work (Tr. 2262). Respondents had made available to the Board, and its counsel, all records of any character without the necessity of order or subpoena. So plainly was this true that, when counsel for respondents suggested that a subpoena should issue for certain records under the control of the Board, counsel for the latter remarked (Tr. 3156):

> "Any difficulty will be an extreme embarrassment to us in view of your own courtesies."

The circumstances relating to the abolition of jobs were fully revealed to counsel for the then Board (Tr. 5511, *et seq.*). Company records were not only accessible to the Board but were scrutinized (Tr. 5769). "Representatives of the Union and counsel went over the payroll records of the Company" (Tr. 5830, 5944). Present counsel would suggest that the labor survey (Board Exhs. 260, 261, 262) is not sufficiently explicit. It was prepared, however, in accordance with the express requirements of Board counsel. Thus (Tr. 6181):

> "Mr. Avrutis: Then I understand that when we reconvene for the purpose of the defense, respondents will give me a list of their mining properties, of all of their properties operated since the strike, showing the number of men employed and their capacities.
> * * *"

Counsel for respondents protested that the preparation of such an exhibit or exhibits was an oppressive burden (Tr. 6181, *et seq.*). The Trial Examiner pointed out to the counsel for the Board that the books of respondents "are open to you" (Tr. 6185). Counsel for the Board announced his intention to examine the books of respondents (Tr. 6188, 6189).

Respondents introduced the report of the President of the International Union wherein he remarked (Tr. 6529):

> "The situation in the Tri-State District is a serious one and has many ramifications. In my opinion the strike was ill-advised. The strike should have been called off as soon as the Militia arrived upon the scene, getting the men back to work and reorganizing so that they could be successful at some future date."

It thus appears that there was no question in the mind of anyone as to the availability of work on or after July 5, 1935.

The labor survey was compiled by respondents, at substantial expense, in compliance with the request of the Board (Tr. 6640). The labor turnover was stressed by the Board (Tr. 6688, 6689, 6690). Upon reopening of the smelter, ninety per cent of the men re-employed were former pre-strike employees (Tr. 6712).

Both counsel for the Board and for the Union were thoroughly familiar with the labor survey (Board Exhs. 260, 261, 262); they utilized such exhibits in cross-examination (Tr. 7617, 7618, 7619). The nature of the exhibits introduced by the Board was thoroughly explained (Tr. 7623, *et seq.*). Payroll records of respondents were examined by counsel for the Board (Tr. 7630).

On availability of records the following statement was made without dispute (Tr. 7633):

> "The suggestion was made by counsel for the Government that the members of the Union wanted an opportunity to check the original payrolls against the exhibits which we had prepared therefrom and which had been used in these roundtable conferences. The original payrolls were thereupon brought into this courtroom and various representatives of the Union and counsel went over those payrolls, checking them not only against their own records and their own memoranda but checking them for accuracy against the memoranda or exhibits which we had prepared. Perhaps I should say more accurately that they checked those exhibits against our original record to determine that when we were producing the transcripts giving record information we did so carefully, honestly and accurately."

All documents relating to the sale of properties, with the resulting elimination of jobs, were revealed to Board counsel (Tr. 7864, *et seq.*). We point out again that the labor survey was under constant scrutiny (Tr. 7896). The Board can not dispute that records of respondents were in every respect accessible (Tr. 7926):

> "Mr. Madden: We have given the only evidence we can which is the evidence as to our records. We are offering the Government a chance to check those records in such a way that unless we are telling these gentlemen the truth about it they can absolutely determine it."

Respondents in this proceeding desire only that it may be so simplified that there can be no misconception of fact. All records of respondents were at all times available to counsel for the Board; exhibits were prepared therefrom. There was no deception, no concealment, no non-disclosure. Every pertinent issue litigated at the

hearing was thoroughly explored, the evidence thereon was complete and accurate, and the final order of the Board demonstrates the adequacy of proof. There is not a word, not a line of evidence, in the entire record to suggest that respondents at any time contended or represented that there was insufficient work available. To the end that this controversy may be determined from all available record proof we cite other record references material thereto (Tr. 73-84, 225, 226, 338, 339, 523, 524, 525, 2257, 2262, 2265, 2601, 2602, 2607, 2608, 2618, 2619, 2620, 2621, 3154, 3156, 4910, 4914, 5032, 5511, 5512, 5513, 5769, 5770, 5829, 5830, 5944, 5945, 6057-6070, 6181-6185, 6188, 6189, 6219, 6528, 6529, 6577, 6579, 6622, 6623, 6625, 6640, 6666, 6688, 6689, 6690, 6705, 6706, 6712, 6825, 6826, 6827, 6832-6855, 6858-7097, 7098-7224, 7227-7298, 7343-7350, 7351-7390, 7405-7430, 7617, 7618, 7619, 7623-7641, 7864-7866, 7880, 7881, 7895, 7896, 7926, 7927, 8184-8189). Pertinent exhibits have been reviewed heretofore.

A limited portion of the argument of counsel for respondents has been reviewed heretofore (*supra*, p. 63). The primary argument of counsel for respondents, upon the issue of discrimination, was that the claimants had been invited and urged to return to their employment in July, 1935, but had refused to do so. Certainly petitioners will not suggest that respondents were making *that* defense, that the unemployment of the claimants resulted from their unwillingness to work, and at the same time arguing that no work was available. Thus we quote from the argument of counsel for respondents (Tr. 8184):

> "When George Potter, moreover, gave them his advice that day, when he suggested to them to permit the men to return to work, to call off the strike and let the men come back, build up their numerical

strength, and then make their demands, he little knew that he was making a suggestion which would be adopted by the president of the International Union two years later as the thing that wisdom would then have dictated, and he little knew, as well, that the National Labor Relations Board some three years later would hold that his statement was a perfect definition of non-discrimination. I shall demonstrate both of those statements.

"As Potter suggested in July, 1935, when the militia were there, that they ought to call off the strike and permit the men to return to work, so did Reed Robinson in the summer of 1937, in the national convention, advise the members of the International Union that that strike had been ill-advised and that they should have called it off and returned to work in June or July, 1935. He adopted the suggestion of George Potter, made two years before, almost in identical words.

"In other words, if your Honor please, not only did George Potter not refuse to receive these union representatives, but he both received and pleaded with them, a plea endorsed by their national president two years later, to return to work. *Is their subsequent unemployment to be charged to us who pleaded with them to return, or is it to be charged to them who declined to permit them to return and thereby prolonged it?*"

* * * * * * *

"First of all let us return to the interview with George Potter on the 16th day of July. Was that a discriminatory interview? Was he telling the men, as counsel would have led you to believe this morning, that 'It is too late for you to return to work'? No. His words (in effect) were, 'Why don't you let them return to work? Why don't you men call off the strike, return to work and build up your numerical strength? Why don't you forget this indefensible strike that you never discussed with us in ad-

vance, return to work under the same conditions, and then make your demands?'

"The National Labor Relations Board has held that that statement constitutes a complete answer to the charge of discrimination. That is manifestly a plea to return to work and necessarily not an exclusion of any man from employment. When George Potter was begging them to return to work, who was it kept them away? We could not go to the members of the International Union and make the plea that George Potter made to their officials. That would be coercion under this Act.

"I do not know today whether those officers ever reported to their membership that Potter issued a general invitation as Berry said, 'to return to work and build up your numerical strength.' I suspect that that information was concealed.

"Now, what did Reed Robinson say about that? Certainly your Honor can not say in the light of that conference of July 16, so frank, so fair, so open, that there was any discrimination apparent. Then on August 2nd, 1937, Reed Robinson, president of the International Union, made this statement in his annual report:

> The situation in the Tri-State district is a serious one and has many ramifications. In my opinion the strike was ill-advised. The strike should have been called off as soon as the militia arrived upon the scene, getting the men back to work and reorganizing so that they could be successful at some future date.'

"Mark you well, if Your Honor please, if Reed Robinson had not known that there was an utter absence of discrimination, would he have made that statement? Does not that statement carry with it the implication that he knew that it was the union, and the union alone, that kept those men from work in the summer of 1935? He says that then, they

should have gone back to work. He implies that that they *could* have gone back to work."

* * * * * * *

"I have referred before, I must refer again, to that significant fact testified to by George, testified to by Newby, testified to by Campbell, a fact which could be challenged and disproved if it were not the truth, that when the smelters, the mines and the mill opened, every former employee who wished to return was permitted to do so, and every application made resulted in the issuance of an employment card."

Is it in logic conceivable that respondents were then contending that work for the claimants was unavailable? Their explicit theory was that the unemployment of the claimants resulted from their unwillingness to labor; they had been invited to return to work; and thereby the Board could not have understood the position of respondents (never so expressed directly or indirectly) to have been that the work to which the claimants were invited to return was in fact unavailable. The claim of petitioners, or of the Board, of deception is an afterthought and not a fact.

Petitioners finally make an appeal to the equities of the situation. Those claimed equities have no relation to the issues presented. In point of fact, the purported equities are meretricious. Thus petitioners would argue that the net back-wage award in a nominal amount, as tendered by respondents, is inequitable; but both petitioners and the Board have sedulously concealed their theory or interpretation of the back-wage award which would amount to a net result of $200,000. The audits, the methods of interpretation, are not before this Court in any record. Thus, petitioners, upon purported Board authority, "*estimate*" that the full back wages, *after* in-

terim earnings, would amount to $800,000 (Pet. Br. pp. 17, 38). There is no record evidence to support this estimate. Similarly, there is no record evidence to confirm the other estimate of the Board, and petitioners, that under the present decree the net back-wage award would not exceed $200,000. We mention the sum of $200,000 as being twenty-five per cent of claimed back-wage losses (Pet. Br. pp. 42, 17). There has been, as yet, no authoritative interpretation of the remedial formula which permits this Court to determine (1) the amount of a full back-wage award, or (2) the amount of the present back-wage award. All is speculation. The Board, and the Union, have consistently declined to reveal the interpretation whereunder they arrive at the figure of a net $200,000 under the present formula. As the court below remarked (R. 310):

> "No agreement has been reached concerning the computations and the decree remains to be carried out."

Thus the attitude of petitioners is that they will argue here that the result reached under respondents' interpretation of the formula, in a nominal amount, after deduction of interim wages earned elsewhere during the same period, which is a circumstance they consistently ignore, is manifestly and palpably inequitable, although they contend at the same time that the true result should be approximately $200,000. They decline, however, to be limited to *that* sum under the undisclosed interpretation of the formula adopted by them and the Board. Thus petitioners seek to convict respondents of an inequitable result without disclosing their contention as to the true result under the formula assailed. All of these estimates are without record support, and remain in the realm of plain speculation. *This* circumstance may be mentioned as a matter of some materiality: In the motion below peti-

tioners assert that Footnote 185 should be deleted from the Board order as enforced by the decree. Such a deletion would result in absurd consequences which would be indefensible. Thus, under the very theory of petitioners (R. 335), if the footnote were deleted, if the number of new or reinstated employees amounted to 600, then under the very hypothesis of petitioners, using their own ratio (R. 335), the 200 claimants would share *one-half* of the wages of 600 men or plainly fifty per cent more than they could have earned upon full employment. As a result, petitioners before this Court have abandoned the only theory of inadvertent error which they charged in the court below. Now they seek to adopt the theory of unilateral error on the part of the Board which is not claimed to have been the result of any act or omission of respondents, and which, moreover, had its origin in the Board memorandum filed in this Court for the first time and never submitted to the court below (Pet. Br. p. 13; Board Memo. on Cer., pp. 11, 12). In other words, petitioners, in the motion to modify filed below, sought to delete the specified footnote from the original Board remedy; they have abandoned that project because of its plainly absurd consequences. They *now* seek to substitute therefor a new correction never contemplated before proceedings in this Court. The plain result of the suggested correction now advocated is to destroy the governing proportion except in limited application. That proportion was, however, unmistakably part of the deliberate and intended remedy incorporated in the Board order and subsequently, at the instance of the Board and the petitioners, translated into a final judicial decree. Petitioners argue that the intent of the Board was to award *full* back wages if employment opportunities permitted, and even assailed the court below for challenging that statement. Yet, when we turn to the brief of the Board

in the original enforcement proceedings, we find this statement (p. 65):

> "Petitioners [respondents now] cannot and do not challenge the reasonableness of the presumption that, had no discrimination occurred, the strikers here involved would have been reinstated approximately in the proportion which their number bore the sum of that number and the number of other old employees who applied after July 5."

It will be noted (as heretofore pointed out) that the Board thus intentionally awarded only fractional back wages, and this without any reference to whether or not the number of men hired after July 5, 1935, exceeded the number of claimants plus the number of other pre-strike employees who thereafter applied for re-employment.

Petitioners ignore this controlling circumstance. The Board sought to find discrimination, to find that respondents refused to reinstate all claimants, for discriminatory reasons, on July 5, 1935. Petitioners will not contend that all claimants were in fact discriminated against, or denied reinstatement, on that date, or that any Board award of full back wages for all claimants could have been made as of that date. Since July 5, 1935, was the effective date of the Act, the Board was without authority to compel the discharge of a single worker then employed. The jobs then held by new men could not have been distributed among the claimants. The Board recognized that it had no power to compel the discharge of any man employed prior to the effective date of the Act. Hence, on July 5, 1935, there could have been no discrimination in fact, and discrimination could only have occurred thereafter when vacancies became available. When, moreover, on that date (even if every man employed had quit) there were only 600 jobs for 1,100 pre-

strike employees. Hence full back wages could not have been awarded all claimants without a plain denial of due process. *Natl. Labor Relations Board* v. *American Creosoting Co.*, 139 F. 2d 193, l. c. 196. Therefore, the Board was driven to a formula. All litigants recognized the situation. Respondents alone resisted its speculative character. No formula, based upon an artificial doctrine of discrimination, from an artificial date of discrimination, can do exact justice. The man who would have been rehired on the artificial date of discrimination is deprived of the full wages which would have been his; the man who would not have been rehired on the artificial date of discrimination is given wages which he would not have received. When respondents urged that this rule-of-thumb formula did not conform to evidence, and was arbitrary and conjectural, the position of the Board, supported by petitioners, was that that issue was none of respondents' concern because the remedy was not so punitive as it could have been. Thus, in the original Board brief in the enforcement proceedings, in answer to the complaint of respondents that there could have been no discrimination, and hence no back-wage award of any character, from the date of July 5, 1935, the Board remarked (p. 66):

> "* * * The contention that the order is hypothetically unfair to one member of the group because he would have been reinstated and received full wages for the period, and correspondingly more than fair to another member who would not have been reinstated, is based upon unprovable premises. In any event, we do not see how such a contention is for petitioners to raise; their sole concern should be whether they are required to pay more to the strikers than they would have paid if no discrimination had occurred."

The formula in the remedy was designedly adopted with full knowledge of its nature and effect.

POINT I.

Petitioners are without capacity to prosecute an application for certiorari to review the ruling below upon the Board petition; they were also without capacity to file the motion to modify or remand below. The court below was without jurisdiction to entertain that motion, and petitioners therefore cannot prosecute certiorari from the ruling thereon.

The petition in the nature of a bill of review was filed below by the Board. The decision thereon was rendered. Subsequently only did petitioners file their initial motion (R. 326). There can be no serious dispute but that the controversy adjudicated below involves the administrative remedies to be pursued by the Board in effectuating the purposes of the Act. After the decision adverse to the Board position was rendered by the court below, the Board, the only qualified litigant adverse to these respondents, elected not to seek certiorari. Petitioners, however, notwithstanding this decision of the public administrative agency, proceeded to apply for certiorari independently. The argument permeating their entire petition is that the court below unduly curtailed the administrative rights and functions of the Board in enforcement of its findings. Such enforcement is unmistakably the exclusive function of that administrative agency. Petitioners can neither supersede nor supplant the Board in the administration of its duties; and the Board in turn could not delegate the administration of such duties to petitioners. The latter plainly regard the Board order, enforced by the decree below, as constitutive of private rights to be prosecuted by private means;

the contrary is true, that the rights are public, to be enforced only by the public administrative agency vested therewith. Under the law the Board formulates its order; under the law it determines in what court, when, and by what method, it enforces such order. No person may object other than that person "aggrieved by a final order of the Board" (National Labor Relations Act, Ch. 7, 29 U. S. C. A., Sec. 160 (f)). The relief thus extended, to such person aggrieved, is to apply for a review of the final order by the United States Circuit Court of Appeals.* Without appropriate action heretofore in correction of claimed error, petitioners now seek review by certiorari of the decision below upon the sole ground that the administrative rights of the Board have been unduly curtailed, and that their theory of Board authority is essential to the effectuation of the purposes of the Act. When the Board has elected, as here, not to proceed by certiorari, then petitioners have plainly presumed to seize upon public rights and are manifestly without capacity to sue. They felt it necessary to join the National Labor Relations Board in this proceeding as an adversary party. If the right to administer this Act were not exclusively vested in the Board, incredible conflicts would inevitably arise. The Board would be seeking enforcement by contempt, while an interested union would be seeking enforcement by vacation of a decree. The resulting chaotic confusion need not be stressed. The ap-

*In their motion to modify or remand below (R. 341) petitioners recited that they were aggrieved by the Board's order and decision as enforced by the Court's decree. If they were aggrieved by the Board order, their remedy was by a petition for review before the Circuit Court of Appeals. If they were aggrieved by the final decree of the Circuit Court of Appeals (if that issue were open to them after they had joined in procuring that decree), their remedy was by a timely application for certiorari. They pursued neither remedy.

parent position of the Board in this proceeding, resisting yet consenting, is no answer to this fundamental issue. The Board cannot delegate its duties of enforcement. If petitioners can pursue Board remedies, by belated consent of the Board as, in effect, *amicus curiae*, then they can pursue Board remedies with the Board in opposition thereto. The complete incapacity of petitioners to discharge the administrative functions of the Board, both by this application for certiorari to review a ruling upon a petition which was exclusively that of the Board, and by its motion to modify or vacate the decree below, followed by an attempted review of the ruling thereon by certiorari, is explicit and unambiguous under controlling decisions. *Amalgamated Utilities Workers* v. *Consolidated Edison*, 309 U. S. 261, 84 L. Ed. 738; *National Licorice Company* v. *National Labor Relations Board*, 309 U. S. 350, 84 L. Ed. 799; *National Labor Relations Board* v. *Sunshine Mining Co.*, 125 F. 2d 757. As the court remarked in *National Labor Relations Board* v. *Sunshine Mining Co.*, 125 F. 2d 757, l. c. 761:

> "It is settled that the Act creates no private right, and that there is no authority anywhere save in the Board itself to inaugurate proceedings for the enforcement of the Board's order or of the decree entered upon its petition. The award of back pay is not a private judgment or a chose in action belonging to the employee, and he has no property right in the award pending his actual receipt of it. Until that time the subject matter remains exclusively under the administrative authority of the Board and in control of the court, and outside interference of any sort would tend inevitably to shackle or impede the free exercise of their powers."

As was further said in *National Labor Relations Board* v. *Thompson*, 130 F. 2d 363, l. c. 367:

"We are, however, obliged to bear in mind that a proceeding under the National Labor Relations Act is not litigation between private parties even though the inquisitorial and corrective powers of the Board may not be invoked without a charge being lodged by individual employees or an employee union. It is a proceeding by a public regulatory body in the public interest. It is neither punitive nor compensatory but preventative and remedial in its nature. *N. L. R. B.* v. *Piqua Munising Wood Products Co.*, 6 Cir., 109 F. 2d 552, 557; *Consumers Power Co.* v. *N. L. R. B.*, 6 Cir., 113 F. 2d 38. As we said of orders of the Board in *N. L. R. B.* v. *Colten*, 105 F. 2d 179, 182, 'they are to implement a public social or economic policy not primarily concerned with private rights, and through remedies not only unknown to the common law but often in derogation of it.' See, also, *Agwilines, Inc.*, v. *N. L. R. B.*, 5 Cir., 87 F. 2d 146, 150, where it was said:

> 'The proceeding is not, it cannot be made a private one to enforce a private right. It is a public procedure, looking only to public ends.' "

See further: *National Labor Relations Board* v. *Killoren*, 122 F. 2d 609, l. c. 612. This issue is jurisdictional. *Greenebaum Tanning Co.* v. *National Labor Relations Board*, 129 F. 2d 487, l. c. 489:

"In our judgment the Labor Act does not contemplate that the courts function in such a manner. However disturbing the situation may be to petitioner's state of mind, as well as its sincere desire to comply with the decree, there appears little, if any, doubt but that the Act contemplates the Board, and it alone, as the agency empowered to investigate, prefer charges when and if it sees fit, and to carry on the prosecution of such charges. That this is so after decree, as well as before, was decided in *Amalgamated Utility Workers* v. *Consolidated Edison*

Co., 309 U. S. 261, on page 270, 60 S. Ct. 561, on page 565, 84 L. Ed. 738, wherein the court said:

> "* * * If the decree of enforcement is disobeyed, the unfair labor practice is still not prevented. The Board still remains as the sole authority to secure that prevention. The appropriate procedure to that end is to ask the court to punish the violation of its decree as a contempt. * * *"

"Therefore we conclude we are without authority in the matter, but even though we are mistaken as to this, we are further of the opinion that the exercise of such authority would serve no good purpose. Respondent's motion to dismiss the petition is therefore allowed."

Similarly: *Stewart Die Casting Co. v. National Labor Relations Board*, 132 F. 2d 801, l. c. 803:

(1) *The right of petitioners to seek certiorari to review the ruling on the Board petition below.* It appears from the foregoing authorities that the filing of the Board petition below was exclusively the function of the Board. Petitioners did not purport to join therein When that petition was denied, the Board enjoyed the exclusive prerogative to seek review. In the first authority above cited it is pointed out that no court has jurisdiction to entertain an attempt by any private person or group to discharge the administrative functions vested in the Board (l. c. 270) and that the only right vested in a private person or group is to *contest* a final order of the Board and not to enforce it (l. c. 266). In seeking certiorari petitioners do not assert that they are *contesting* a Board order; thereby they seek to *enforce* a claimed Board remedy. If, moreover, petitioners were to assert that they are seeking to contest a final Board

order, then plainly they are some five years too late to do so under the Act.

(2) *The right of petitioners to file their motion to modify or vacate the decree below, the jurisdiction of the court below to entertain such motion, and their right to seek a review of the ruling thereon.* The arguments heretofore made apply with greater force to the attempt of petitioners to enforce administrative remedies by their independent motion filed below. Their position in this respect, in fact, conflicts with their general position that the Board is vested with exclusive jurisdiction over administrative procedure, and the enforcement judicially of administrative rights. It is plain under controlling authorities, cited *supra*, that petitioners were without right to file their independent motion to modify or vacate the decree, or to seek review by certiorari of the ruling thereon, with the result that such ruling is not reviewable.

POINT II.

The decision below, upon a purely factual basis, cannot be, and is not, in conflict with the decision of any other circuit court of appeals on the same matter, has not decided an important question of federal law which has not been, but should be, settled by this court, has not decided a federal question in a way probably to conflict with applicable decisions in this court, and has not so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

We have heretofore noted that the alleged "questions presented" were not involved in the decision below, and that that decision was purely factual. A factual decision will not be reviewed upon certiorari. *Southern Power Co. v. North Carolina Public Service Co.*, 263 U. S. 508, 68

L. Ed. 413; *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 82 L. Ed. 1273; *United States* v. *Johnston*, 268 U. S. 220, 69 L. Ed. 925. We suggest that petitioners have ignored the recognized limitations upon the function of certiorari: *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 67 L. Ed. 922.

POINT III.

The court below did not foreclose the Board from taking any proper administrative action; its only ruling was that there was an insufficient basis presented either for vacating its final decree or remanding that portion of the decree criticized to an administrative agency for suggested revision; and petitioners' arguments ignore both the doctrine of finality of judgment and of control by the court below over its own judgments.

It is difficult to understand precisely the theory of petitioners. Thus they venture to assert (Pet. Br. p. 24) that "the present proceeding concerns the procedure to be followed in executing this order," which, at the instance of the Board and petitioners, was translated into a final judicial decree. This statement, of course, is untrue. The present proceeding seeks not to execute the original order and decree, but to vacate and nullify it. Destruction and not execution is the object designed. The only pretense for the action taken is the claim that the Board, during compliance investigations, determined that its remedy, transformed into a final judicial decree, whereunder rights had finally accrued as of August 23, 1941, did not achieve the result intended (Pet. Br. p. 24). This contention, thus alleged, remains in the realm of speculation and conjecture; it is not supported by pleading or proof.

Petitioners next suggest that the Board should have proceeded to modify a final judicial decree of the Circuit

Court of Appeals by independent action without even the courteous gesture of applying to that court for permission so to do (Pet. Br. p. 24), and criticizes that Court for venturing to hold that its decree was under its control and jurisdiction, that it was final, and that it could not be set aside except upon the basic requisites of a bill of review. The decision below does not stand as an injunction (Pet. Br. p. 24) against further administrative action by the Board; if it stands as an injunction at all, that injunction only precludes the Board, an administrative agency, from presuming to vacate and rewrite a judicial decree. We were unaware, prior to this proceeding, that any administrative agency enjoyed or claimed to enjoy that prerogative. It is not strange that petitioners remark that no authorities sustain their position, and that it will therefore be necessary to consider the issues "broadly" (Pet. Br. p. 25). We cannot but feel that a single quotation completely answers the contentions made (*General Tobacco Co.* v. *Fleming*, 125 F. 2d 596, l. c. 599):

> "In the exercise of the judicial power to review questions of law, as conferred by an Act of Congress, the seal of a United States Court should not become a mere rubber stamp for the approval of arbitrary action by an administrative agency. Why, in the context, should any power of review whatever, have been vested in the courts, unless Congress intended that such review should be judicially exercised?"

Thus the alternative theory of petitioners is that after a mere courteous gesture to the court below, the latter, as an automaton, without judicial consideration of the legal or factual basis for the relief prayed, was compelled to grant it at the instance of Board or Union. The requirement of due process cannot be satisfied by such delegation. The court below acted judicially, and the only complaint of petitioners is that it did so and failed to act as if under a conclusive mandate from the Board

effective upon the filing of the Board pleading. We propose to discuss each of the contentions made by petitioners *seriatim*, and to demonstrate the misconception by petitioners of the respective functions of the court and an administrative agency:

(A) The contention of petitioners that the Board is the proper tribunal to decide whether, after enforcement, further administrative action is necessary.

The difficulty with this contention is that it is not involved in this proceeding. Whether the Board may take further administrative action, after the final enforcement decree, is not in issue. The issue is whether the Board, an administrative agency, may modify or vacate a final judicial decree, or compel the enforcing court to do so upon mere demand. The suggestion (Pet. Br. p. 36) that the court below could no more prevent the Board from modifying a final judicial decree, than it could prevent the Board from issuing a complaint, is revolutionary. Under that theory the judiciary would be subordinated to the administrative agency, and such subordination is inconceivable. Thereby judicial processes would be subjected to the vagaries of administrative action. We proceed to the particular arguments made by petitioners.

(1.) *The contention of the petitioners that the authority of the Board does not terminate with the entry of a judicial decree.* This is academic here. We reiterate: the issue is whether the authority of the Board, after the entry of a final judicial decree, extends to administrative vacation or modification thereof. Industrial relations may be "dynamic and changing" (Pet. Br. p. 27), but no continued supervision is required over a back wage decree fixing accrued rights and liabilities in the past. Petitioners misconceive the functions of the

Board in proceedings supplemental to a final enforcement decree. The Board may determine the concrete amount of back pay *under* a decree; it cannot determine an amount of back pay in violation of a decree. The distinction is manifest. Finally, the court must construe its own decree; it cannot, it should not, delegate that function to an administrative agency; by superlatively stronger reasoning it cannot, it should not, delegate to that administrative agency the modification or vacation of that decree. That is the only issue here.

(2) *The contention of petitioners that, in dealing with unfair labor practices, the courts are limited to specific functions.* Here again we are dealing with an administrative terminology which is without application to the issue involved. The functions of the reviewing Circuit Court of Appeals in a Labor Board proceeding are explicitly delimited. Thus the Board is vested initially with complete jurisdiction; when review or enforcement proceedings are initiated, exclusive jurisdiction passes to and is vested in the court; the final judgment and decree of the court is final subject only to the then timely review upon certiorari. National Labor Relations Act, 29 U. S. C. A., Sec. 160, p. 239. We shall not discuss the rather bold admonitions from petitioners to the courts suggesting that the scope of judicial review, within jurisdiction, should be limited (Pet. Br. p. 33).

(3) *The contention of petitioners that the Board is the proper tribunal to decide whether a given decree will adequately effectuate the policies of the Act.* This is a rather novel doctrine. In other words petitioners assert that any judicial decree, final under the statute, final under the recognized rule that a judgment or decree is final after the term, is subject to revision without notice by the National Labor Relations Board by *ex parte*

determination. The mere statement of the issue defeats the argument. Petitioners venturesomely assert, moreover, that the Board "was ill advised" in seeking judicial approval before it vacated the judicial decree (Pet. Br p. 36). Counsel for petitioners even disingenuously point out that the court below plainly erred in not pointing out to the Board that the latter "needed no special permission from the court to proceed with its administrative functions" (Pet. Br. p. 37). Apparently petitioners are indulging in a lecture both to the Board and the court below. They rely solely upon the authority of *American Chain & Cable Co., Inc.*, v. *Federal Trade Commission*, 142 F. 2d 909, and seek to distinguish *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364. The two authorities deal with different acts. Any lawyer would challenge the proposition that an administrative agency has the authority to vacate a final judicial decree, and it would take substantial argument to convince him. The *American Chain & Cable Case, supra*, does not furnish that convincing argument. It is plainly distinguishable. Thus the Federal Trade Commission Act specifically provides that the Commission "may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section * * *" (142 F. 2d 909, l. c. 911). There is no such provision in the National Labor Relations Act. Any order, moreover, of the Federal Trade Commission is prospective only, injunctive in its nature, and operates only *in futuro*. Here, since admittedly the terminal date of alleged discrimination was August 23, 1941, any modification pursuant either to the February 4, 1943, petition of the Board, or the May 11, 1944, motion of petitioners, would be retrospective and not prospective in operation. It would deal not with the future but the past. As was pointed out in the

American Chain & Cable Case, supra, the modified decree could at most operate only prospectively and *in futuro.* This distinction is pointed out in the authorities heretofore cited (*supra,* p. 29 *et seq.*). There the *Swift Case* (286 U. S. 106) was mentioned:

> "A continuing decree * * * describing events to come is subject always to adaptation as events may shape the need. * * * The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative."

Thus here petitioners do not seek to modify the decree, for the prospective effect thereafter, but to vacate the decree for the retrospective effect theretofore. It is significant that they cite no authority for such an extraordinary procedure. They compare the situation to one prevailing under an alimony decree (Pet. Br. p. 48). Absent specific statutory authority, the very text states that "the power to modify extends only to future installments and not to alimony already accrued" (19 C. J. 273). Petitioners have misconceived their analogy. That which they seek to do here is tantamount to an attempt to revise and increase on January 1, 1944, an alimony judgment which, under its precise provisions, had terminated by, for example, remarriage on January 1, 1942. No judgment may be modified to increase it in the past. If prospective only in operation, if effective only *in futuro,* it may, upon a change of conditions, be modified thus to operate after the date of such modification. No change of conditions is here involved, or alleged, after the date of the decree, and the only purported object of the modification sought is that the decree, as modified, should have effect retrospectively and not prospec-

tively, in the past and not in the future. The fallacy of the entire argument of petitioners is thus apparent. Petitioners have invoked alimony judgments or decrees as a pertinent analogy. The authorities cited destroy their contention. Thus in *Sistare* v. *Sistare*, 218 U. S. 1, 54 L. Ed. 905, this court held that accrued liabilities could not be affected even by a subsequent lawful modification of a decree. To the same effect: *Caples* v. *Caples*, 47 F. 2d 225. We have mentioned heretofore that the failure to perceive this distinction was the inherent vice of petitioners' argument (*supra*, p. 34). The ruling in *Ford Motor Company* v. *National Labor Relations Board*, 305 U. S. 364, 83 L. Ed. 221, namely, that the authority of the Board to modify or set aside its order ends with the filing in court of the transcript of record in connection with the Board petition for enforcement of the order, or in a proceeding for review of the order by a person aggrieved, controls. The decision last cited completely destroys the contention of petitioners that at any time after review or enforcement proceedings jurisdiction was revested in the Board. Thus (l. c. 371):

> "* * * It is clear that the court was possessed of exclusive jurisdiction of the administrative proceeding 'and of the question determined therein,' and thus of the power of 'enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board' (Sec. 10(f))."

Further (l. c. 372):

> "* * * The Board in the presence of the court's continued and exclusive jurisdiction, remained without authority to deal with its order."

A fortiori the contentions of petitioners, that the Board alone must determine whether a final decree should be modified, are without merit.

(B) The contention of petitioners as to the factors governing determination whether a Board order, incorporated in a decree, should be reconsidered.

The foregoing discussion disposes of this argument of petitioners. The suggestion is made that, miraculously, a decree procured by the Board is removed from the scope of ordinary rules of finality. That is not true. Petitioners can cite no authority in support of that doctrine. The Board enjoys no royal prerogative and in fact a royal prerogative is unknown in present-day jurisprudence. *Southern Bell Telephone* v. *National Labor Relations Board*, 129 F. 2d 410, 1. c. 412. The prerogative suggested, moreover, is (as heretofore specified) in conflict with the controlling statute and the controlling decisions of this Court. Petitioners do not contend, they could not contend, that the proceedings below satisfied the requirements of a bill of review. Their suggestion that they are relieved from the burden of such procedure is both without authority and without merit.

(C) The contention of petitioners that the circumstances of the instant case warrant administrative reconsideration of the back pay remedy.

We have discussed heretofore that the Court, and not the administrative agency, is charged with jurisdiction in this respect.

(1) *The contention that the assumptions of the Board, upon which it predicated its formula, were false.* The falsity of this premise of petitioners has been heretofore discussed (*supra*, p. 39 *et seq.*). We have further commented that the Court below was without jurisdiction to disregard its final judicial decree, or delegate that decree for revision to an administrative agency.

(2) *The contention of the Board that Footnote 185 of the formula contains a mistake defeating the expressed intent of the Board.* This was a matter never presented to the court below. As heretofore noted the mistake there suggested (R. 337) has been abandoned. If this mistake was thus palpable upon the face of the record (and petitioners disavowed any intention of submitting evidence thereon), they have yet to explain their failure to review the error by appropriate procedure. It would be a strange doctrine if the Union, but not the employer, was privileged to correct a final decree after it had failed to take appropriate action under the statute, incident to the enforcement proceeding, as it was required to do.

We have adverted to the circumstance that the appeals to purported equities are without record support (*supra*, p. 71). The court below was certainly vested with the right to determine and to construe its own decree (Pet. Br. p. 42); all relevant factors were considered (R. 307). The suggestion that respondents "shifted their campaign * * * to the more successful practice of extensive judicial review" (Pet. Br. p. 45) is rather meaningless in view of the fact that the Board, and not respondents, have conducted that litigation.

(D) The contention of petitioners that, irrespective of any other consideration, the remedy became inapplicable for the period of discrimination following the close of the hearing by reason of changed circumstances.

This argument requires little answer. There was no evidence of changed circumstances either after the Board hearing or after the final decree. We have reviewed the facts to demonstrate this conclusion.

(1) *The contention of petitioners that the remedy was in greater part prospective, and based upon hypothesis and assumption instead of proven facts.* It comes

with ill grace from petitioners, or from the Board, supporting petitioners, to criticize the Board order on the basis that it was predicated upon "hypothesis and assumption instead of proven fact." *Woolworth* v. *National Labor Relations Board*, 121 F. 2d 658, l. c. 663. In other words petitioners seek now to argue that the Board, as in the authorities cited, was entitled to enforce a final decree, based upon hypothesis and assumption, against an employer, over his resistance, but is clothed with a procedural immunity which permits it to disregard, or alter, that finding if it subsequently desires so to do. The facts have been discussed in detail. There is no merit in petitioners' contention.

(2) *The contention of petitioners that a back wage decree is subject to revision if it develops that it fails to accomplish or achieve the results which a subsequent Board asserts the predecessor Board intended.* Again have the facts been discussed both in statement and argument. Petitioners' assumptions are plainly contrary thereto. They cite only the *Corning Glass Works Case* (129 F. 2d 967). There no issue of finality of judgment was involved; there no contention was made that the reviewing court should surrender its control over its own judicial process. That decision was foreign to the issues here. The distinction between retrospective and prospective decrees, and the modification thereof, has been heretofore discussed.

The sole issues raised by petitioners are plainly without substance.

POINT IV.

The Board and petitioners invoked the exercise of the sound discretion of the court below; they cannot complain of the exercise thereupon of such discretion; and plainly the discretion was exercised properly without abuse. The decision below was correct. That decision is not reviewable here.

The foregoing proposition cannot be challenged. Certainly petitioners must recognize the distinction between an attempted remand to the Board for the enforcement of a decree, and an attempted remand designed for its abrogation. Courts of the United States are not compelled to divest themselves of their judicial functions or to transfer such judicial functions to an administrative agency. When the Board below filed its petition in the nature of a bill of review in equity, it undertook the burden of establishing the facts therein alleged. It is elementary that the factual issue was one for the sound discretion of the court below, and that such issue was the *only* issue determined there. The Board order, and the final decree of June 27, 1941, definitely and irrevocably, fixed the accrued rights involved. No change of conditions thereafter occurred, or are claimed to have occurred. No adjustment was sought either by the Board or petitioners in the interim. There is no arbitrary right to vacate a decree, final under the statute, final by the lapse of time, by a petition in the nature of a bill of review without factual proof in support thereof. When the Board below presented its petition to the court it alleged deception and newly-discovered evidence, together with a claim of due diligence; the certified record examined by the court below disclosed (as heretofore demonstrated) that each of the claims was equally unfounded. Petitioners, however, contend that the court below, as a

mere automaton, as a rubber stamp, was compelled to place the imprimatur of its approval upon a falsehood or falsehoods, and to vacate its decree *eo instante* and to remand the cause upon the mere demand of an administrative agency. It is self-evident that when the Board, and petitioners, invoked the jurisdiction of the Court below to pass upon the factual issues of the respective petitions for a bill of review, they necessarily submitted those factual issues to that court. Those issues have been decided, and petitioners fail to point out any error in the decision. Petitioners ultimately suggest that the Board was guilty of inadvertent unilateral error entirely divorced from deception. If such error was thus palpable upon the face of the record, then, as aggrieved litigants, their duty was to file a petition for review. They did not do so. To the contrary they joined with the Board in procuring the decree incorporating the alleged error. There is no claim that this asserted error was subsequently revealed by reason of any newly-discovered evidence. In other words, if the error existed, petitioners joined in its commission.

While the issue is not here presented, the ruling of the court below was eminently correct. Petitioners do not contend that, if they and the Board were required to support the requisite, by pleadings and proof, of a bill of review, they did so.* As the court remarked in *Central Bank* v. *Wardman*, 31 Fed. Supp. 685, l. c. 688, 689:

> "The court will treat these motions as bills of review because the relief sought is that commonly sought by such a bill." * * *
>
> "The motions under consideration require the court to look to the evidence. A party is not at liberty to go into the evidence at large in order to establish an objection to the decree founded on the

* We have enumerated, supra (p. 26) respondents' contentions before

supposed mistake of the court in its own deductions from the evidence. *Whiting* v. *Bank of United States*, 13 Pet. 6, 14, 10 L. Ed. 33; *Buffington* v. *Harvey*, 95 U. S. 99, 24 L. Ed. 381; *Shelton* v. *Van Kleeck*, 106 U. S. 532, 1 S. Ct. 491, 27 L. Ed. 269; *McGowan* v. *Elroy*, 28 App. D. C. 84; *Adriaans* v. *Reilly*, 27 App. D. C. 167."

See, in this connection, *Manning* v. *Insurance Co.*, 107 Fed. 52; *U. S.* v. *Ali*, 20 F. 2d 998; *Hart* v. *Wiltsee*, 25 F. 2d 863, and *Roman* v. *Alvarez*, 30 F. 2d 813. In the authority last cited the court remarked (l. c. 814):

> "We are not called upon to decide the merits of the questions raised by the motion and passed upon by the District Court; for that court after the term at which the judgment or decree was entered was without power upon motion to set it aside. *City of Manning* v. *German Insurance Co.*, (C. C. A.) 107 Fed. 52; *Hart* v. *Wiltsee*, (C. C. A.) 25 F. 2d 863."

In *Chase* v. *Driver*, 92 Fed. 780, l. c. 786, Judge Sanborn remarked:

> "Moreover, this decree of April 9, 1896, was obtained, not at the suit of the appellees, but at that of the appellant. He it was who prayed for the decree, and who, when it was made, put it into execution. It was at his request, and for his benefit, against the protest of the appellees, that the decree and the sale were made. When the decree was entered, he had the option to refrain from filing his bond, and to appeal to this court for its reversal or modification, or to file his bond and accept the terms of the decree. He chose the latter alternative. He took the benefit of the sale offered him under the decree which he had sought, and it is too late for him now to escape the terms prescribed or the burdens imposed thereby. One who accepts the benefits of a decree or judgment is thereby estopped from reviewing it, or from escaping from its burdens. *Al-*

bright v. *Oyster*, 60 Fed. 644, 9 C. C. A. 173, 19 U. S. App. 651. 'Parties to suits must act consistently. They will not be heard to complain of errors which they have themselves committed, or have induced the trial court to commit. *Long* v. *Fox*, 100 Ill. 43, 50; *Nitche* v. *Earle*, 117 Ind. 270, 275, 19 N. E. 749; *Dunning* v. *West*, 66 Ill. 366, 367; *Noble* v. *Blount*, 77 Mo. 235; *Holmes* v. *Braidwood*, 82 Mo. 610, 617; *Price* v. *Town of Breckenridge*, 92 Mo. 378, 387, 5 S. W. 20; *Fairbanks* v. *Long*, 91 Mo. 628, 633, 4 S. W. 499; *Walton* v. *Railway Co.*, 56 Fed. 1006, 6 C. C. A. 223, and 12 U. S. App. 511, 513."

In *Hill* v. *Phelps*, 101 Fed. 650, Judge Sanborn said (l. c. 651, 652, 653, 654):

"The purpose of a bill of review is to obtain a reversal or modification of a final decree. There are but three grounds upon which such a bill can be sustained. They are (1) error of law apparent on the face of the decree and the pleadings and proceedings upon which it is based, exclusive of the evidence; (2) new matter which has arisen since the decree; and (3) newly-discovered evidence, which could not have been found and produced, by the use of reasonable diligence, before the decree was rendered."

* * * * * * *

"The error in law which will maintain a bill of review must consist of the violation of some statutory enactment, or of some recognized or established principle or rule of law or equity, or of the settled practice of the court. Error in matter of form or in the propriety of a decree, which is not contrary to any statute, rule of law, or to the settled practice of the court, is not sufficient to maintain a suit to review a final decree. *Freeman* v. *Clay*, 2 U. S. App. 254, 267, 2 C. C. A. 587, 593, 52 Fed. 1, 7; *Hoffman* v. *Pearson*, 8 U. S. App. 19, 38, 1 C. C. A. 535, 541, 50 Fed. 484, 490. Resort cannot be had to

the evidence to discover this error of law. It must be apparent from the pleadings, proceedings, and decree, without a reference to the evidence, or it will not avail to sustain a bill of review. *Whiting* v. *Bank*, 13 Pet. 5, 14, 10 L. Ed. 33; *Kennedy* v. *Bank*, 49 U. S. 586, 609, 12 L. Ed. 1209; *Putnam* v. *Day*, 22 Wall. 60, 66, 22 L. Ed. 764; *Buffington* v. *Harvey*, 95 U. S. 99, 24 L. Ed. 381. The new matter which will authorize a review of a final decree must have arisen after its rendition. The newly discovered evidence which may form the basis of such a review must be, not only evidence which was not known, but also such as could not, with reasonable diligence, have been found before the decree was made. *City of Omaha* v. *Redick*, 27 U. S. App. 204, 211, 11 C. C. A. 1, 6, 63 Fed. 1, 6; *Dias* v. *Merle*, 4 Paige 259, 261; *Henry* v. *Insurance Co.*, (C. C.) 45 Fed. 299, 303; Story, Eq. Pl., Secs. 338a, 423; 1 Barb., Ch. Prac., 363, 364; 1 Hoff., Ch. Prac., 398; Fost., Fed. Prac., Sec. 188, note 19."

* * * * * * *

"Conceding, however, but not deciding, that the decree in the suit upon the first claim renders the question whether or not the trust deed should be avoided for fraud *res adjudicata* in a subsequent suit for that purpose on the second claim, no ground for review or modification of the decree is presented by the allegations of the bill before us. There was no error in law in that decree. It followed the pleadings, and determined all the issues which they presented. Whether or not it was warranted by the evidence and whether or not the evidence authorized other or further relief, are questions that are not open for consideration here, because the error that will sustain a bill of review must be apparent upon the pleadings, the proceedings, and the decree, without reference to the evidence. There was no error in the failure of the court to grant more relief than the substitution of the joint debt for the separate debt, because it granted ample relief to accomplish

the purpose of the suit, and because, in the absence of the evidence, which we cannot consider, it does not appear that the proofs would have sustained any other relief. One cannot successfully assail the decree of a court of chancery, which has procured him all the resulting benefit he sought, because the court did not make further adjudications and grant other relief, which were not necessary to the accomplishment of the purpose which he disclosed to the court. It is not error for a court of chancery, which grants sufficient relief to enable a complainant to reap all the fruits which he seeks by his litigation, to refuse to exercise all its powers and make other and unnecessary adjudications. The court granted relief which enforced the collection of the only claim which the complainants presented to it. They have received payment of that claim. They suffered nothing in that suit from the failure of the court to avoid the trust deed, because they could have obatined nothing more if it had done so. Courts of equity do not attempt to right wrongs at the suit of those who have suffered nothing from them, or to grant decrees that can give their suitors no relief. *Darragh v. Manufacturing Co.*, 49 U. S. App. 1, 16, 23 C. C. A. 609, 618, 78 Fed. 7, 16. No error appears in the pleadings, proceedings, or decree on account of the fact that the latter may have the effect to estop the appellants from collecting their second claim by avoiding the trust deed for fraud, because that claim was not pleaded, proved, or presented in the suit upon which the decree is based, and its existence was unknown to the court when it rendered its decree. As the question of the effect of its decree upon this second claim was not presented to, considered or decided by, the court below when it entered its decree, it could not have erred upon that question. The bill of review discloses no error in law in the decree which it assails. Nor does the bill disclose any new matter or any newly-discovered evidence which will warrant the relief it seeks. The sole ground for

that relief is that the decree of December 22, 1897, estops the appellants from enforcing the collection of their judgment of December 26, 1896, by an avoidance of the trust deed for fraud. But the debt upon which that judgment is founded existed during the entire pendency of the suit in equity upon the first claim of the appellants, and all the facts which condition the effect of the decree in that suit upon their second claim were as well known to the appellants at the time that decree was rendered as they ever have been since. Mr. Justice Story, at Section 423 of his Equity Pleadings says:

> 'If, therefore, the party proceeds to a decree after the discovery of the facts upon which the new claim is founded, he will not be permitted afterwards to file a supplemental bill in the nature of a bill of review, founded on those facts; for it was his own laches not to have brought them forward at an earlier stage of the cause.'

"The decree cannot be modified on account of new matter or newly-discovered evidence, because the matter set forth in the bill existed and the evidence it pleads was known, before the decree was rendered.

"*There is another reason why the decree in this case cannot be reviewed. It is that the appellees have paid, and the appellants have accepted, the entire debt which the decree was rendered to enforce. One who accepts the benefits of a verdict, decree, or judgment is thereby estopped from reviewing it, or from escaping from its burdens. Albright* v. *Oyster*, 19 U. S. App. 651, 9 C. C. A. 173, 60 Fed. 644; *Chase* v. *Driver*, 92 Fed. 780, 786, 34 C. C. A. 668, 674; *Brigham City* v. *Toltec Ranch Co.*, (C. C. A.) 101 Fed. 85. The decree below is affirmed." (Italics ours).

The enforcement decree was entered in terms prescribed by the Board; it cannot now complain. Particularly is

this true, moreover, when the claimed representation was never made, when the Board was never misled, when its findings followed the facts conceded then and now to be true, and when the court below found affirmatively, and properly, that the work was available which the present Board argues its predecessor was deceived into believing did not exist. That predecessor found that such work was available and did exist. The Court below so found; no deception or misconception was involved; and that, aside from legal issues, should terminate the controversy.

We have adverted to the circumstance that neither the Board proceedings or pleadings, nor petitioners' proceedings or pleadings, below, justified the granting of leave (which the court below denied) to file a bill of review. *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 321 U. S. 238, 88 L. Ed. 936, l. c. 942 and 948, n. 4; *Kithcart* v. *Life Insurance Co.*, 88 F. 2d 407, l. c. 410. The phraseology used in the latter authority is directly applicable. If fraud is charged, if misconception is charged, in the Board or petitioners' proceeding below, it is not set out with any particularity. The material facts are not alleged. Even the substance of the inadvertent withholding of information, whatever that may mean, is not averred. Here respondents had records concededly made in every respect available to the representatives of the Board. It was not the duty of respondents to prepare the Board case for trial, but every request or demand by the Board was complied with by respondents. In *Rothschild* v. *Marshall*, 51 F. 2d 897, l. c. 899, the court said:

> "In a case decided in 1850, the Supreme Court set forth the grounds on which a bill of review may be filed: 'Since the ordinances of Lord Bacon, a bill of review can only be brought for "error in law ap-

pearing in the body of the decree or record," without further examination of matters of fact; or for some new matter of fact discovered, which was not known and could not possibly have been used at the time of the decree.' *Kennedy et al. v. Georgia State Bank et al.*, 49 U. S. (8 How.) 586, 609, 12 L. Ed. 1209. See, also, *Hill et al. v. Phelps et al.*, (C. C. A.) 101 Fed. 650, 651, and Cyc., Fed. Proc., Vol. 4, Sec. 1139, pp. 283, 284.

"To relieve against a judgment on the ground of accident or mistake, if it appears at all in a case like the one before us, it must be shown that the complaining party was without fault or negligence. A court is without power to grant relief if it appears that the party alleged to have been aggrieved could have, with proper diligence, prevented the mistake complained of. 'Laches, as well as positive fault, is a bar to such relief.' *Brown v. County of Buena Vista*, 95 U. S. 157, 159, 24 L. Ed. 422. As we shall see in a moment no error of law sufficient to sustain a bill of review was apparent on the face of the record."

• • • • • • • •

"Reverting to the question of the sufficiency of the bill of review in the present instance, from the foregoing it is clear that a bill of review can be based upon only two grounds:

"(a) That the judgment contained an error of law apparent on the face of the record.

"(b) That new matter or new evidence was being urged in support of the bill of review.

"If the bill of review is based upon ground (a), it must be filed within the time allowed for the filing of an appeal—or three months from the date of the final decree of the lower court. Cyc., Fed. Proc., Vol. 4, Sec. 1149, pp. 316, 317; 28 U. S. C. A. 230; O'Brien, Manual Fed. App. Proc., p. 94. If it be based upon ground (b), we find that it may not be

filed in the lower court, even by a nonappealing party, when an appeal has been taken, without leave of the appellate court. Cyc., Fed. Proc., Vol. 4, Sec. 1150, p. 318; *National Brake & Electric Company* v. *Christensen et al.*, 254 U. S. 425, 430-431, 41 S. Ct. 154, 65 L. Ed. 341; *Franklin Savings Bank et al.* v. *Taylor et al.*, (C. C. A.) 53 Fed. 854, 865-866; *Suhor et al.* v. *Gooch*, (C. C. A. 4) 248 Fed. 870, 871; *American Foundry Equipment Company* v. *Wadsworth*, (C. C. A.) 290 Fed. 195, 196."

* * * * * * *

" 'Courts of record speak through the judgments or decrees entered upon their records, and where a judgment or decree is unambiguous, an opinion delivered by the judge rendering it at the time the same is entered will not be looked to to give such judgment or decree an effect different from that which clearly follows from the language used.' *Kane Hardware Co.* v. *Cobb*, 79 W. Va. 587, 91 S. E. 454." (Italics ours).

The excerpt last quoted demonstrates that the successor Board cannot ascribe to its predecessor, or to the court below, a claimed understanding contrary to that appearing in the final decree. In *Simonds* v. *Indemnity Co.*, 73 F. 2d 412, l. c. 415, the court declared:

"Bills of review may be maintained upon the following grounds: (1) For error apparent in the record; (2) newly discovered evidence; (3) fraud in procuring the decree."

* * * * * * *

"Before entering upon a specific discussion of the status of the instant case, it may be instructive to examine the controlling decisions which condition recovery in suits of this nature.

" 'Generally speaking, the facts which condition the granting of relief by a court of equity against the enforcement of a judgment are: First, that the

party seeking the relief had a good defense against the cause of action on which the judgment was entered; second, that he was prevented by fraud, concealment, accident, mistake, or the like from presenting such defense; and, third, that he has been free from negligence in failing to avail himself of the defense.' *Continental Nat. Bank* v. *Holland Banking Co.*, (C. C. A. 8) 66 F. 2d 823, 829."

* * * * * * *

"Bills of review for newly discovered evidence are not favored by the courts. Their allowance rests upon a sound judicial discretion to be exercised cautiously and sparingly. It must be shown convincingly that the matter could not have been discovered or submitted in the exercise of reasonable diligence, and in time to be presented during the progress of the litigation now culminated in judgment or decree. *Obear-Nester Glass Co.* v. *Hartford-Empire Co.*, (C. C. A. 8) 61 F. 2d 31, 34; *Southard* v. *Russell*, 16 How. 547, 14 L. Ed. 1052."

* * * * * * *

"As said in *United States* v. *Throckmorton*, 98 U. S. 61, 65, 25 L. Ed. 93, there are no maxims in law more firmly established than that it is to the interest of the public that there should be an end to litigation, and that no one ought to be twice vexed by one and the same cause of action; and further that 'the doctrine is equally well settled that the court will not set aside a judgment * * * for any matter which was actually presented and considered in the judgment assailed.' l. c., p. 66 of 98 U. S."

In *Railway* v. *United States*, 106 F. 2d 899, l. c. 902, the court said:

"We have treated this application as an application for permission to apply to the lower court for leave to file a bill of review. Rules relating to the practice in such matters have frequently been considered by this court. *Obear-Nester Glass Co.* v. *Hart-*

ford-Empire Co., 8 Cir., 61 F. 2d 31; *Hagerott* v. *Adams*, 8 Cir., 70 F. 2d 352; *Kithcart* v. *Metropolitan Life Ins. Co.*, 8 Cir., 88 F. 2d 407; *Simonds* v. *Norwich Union Indemnity Co.*, 8 Cir., 73 F. 2d 412, 415.

"Where, as here, the basis for the bill is newly discovered evidence, it is incumbent upon the applicant to show clearly and distinctly the facts claimed to constitute the newly discovered evidence. These facts should be supported by affidavits of witnesses competent to testify to them, so as to enable the court to determine whether the newly discovered evidence when produced will be material to the issue and of such character as probably to change the result. There must also be convincing proof that the parties seeking the review did not have any knowledge of the new matter set forth, at the time of hearing, or when the original decree was entered, and proof which convinces that such alleged facts could not, in the exercise of reasonable diligence, have been discovered."

* * * * * * *

"No act of the appellee prevented the appellants from introducing any evidence they cared to introduce on this question."

* * * * * * * *

"This charge is based upon the claim that the lower court was misled by the testimony of one of appellee's witnesses as to the percentage of this material which was used commercially secondhand. It is not claimed that by any fraudulent act of the appellee the appellants were prevented from having their day in court, or submitting proof on this issue."

* * * * * * * *

"The mere use of the terms 'fraud,' 'misrepresentation,' and 'untrue testimony' cannot be accepted as facts."

* * * * * * * *

"Fraud, to be available, must be extrinsic to the issues which were determined. *Continental National*

Bank v. *Holland Banking Co.*, 8 Cir., 66 F. 2d 823; *Kithcart* v. *Metropolitan Life Ins. Co.*, *supra*. Mere erroneous, or even perjured testimony, which relates simply to the issue directly contested, does not constitute extrinsic fraud. *United States* v. *Throckmorton*, 98 U. S. 61, 25 L. Ed. 93; *Continental National Bank* v. *Holland Banking Co.*, *supra*.

"There is neither adequate averment nor competent proof of newly discovered evidence. Neither has any actionable fraud been alleged, and the inadequate allegation is wholly unsupported by proof."

The application of the foregoing principles to the instant proceeding requires no comment. In *Sorenson* v. *Sutherland*, 109 F. 2d 714, l. c. 719, it appears:

"Moreover, if a decree is to be set aside, on the ground of fraud, nine years after it was rendered, the remedy would have to be by bill of review, which would only be allowed if the court were satisfied that the evidence was not available at the time the original suit was litigated and that it was presented without undue delay after discovery. *United States* v. *Throckmorton*, 98 U. S. 61, 25 L. Ed. 93; *Central Trust Co.* v. *Grant Locomotive Works*, 135 U. S. 207, 10 S. Ct. 736, 34 L. Ed. 97; *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 421, 43 S. Ct. 485, 67 L. Ed. 719."

In *Obear-Nester* v. *Hartford*, 61 F. 2d 31, l. c. 34, the court thus defined the doctrine:

"The new evidence must, of course, be material to the issues determined by the decree, and it must appear that the proof has not only come to light subsequent to the entry of decree, but that it could not have been discovered in the exercise of reasonable diligence in time to permit its being used in the original trial. Like motions for a new trial on the ground of newly discovered evidence, a bill of review

for newly discovered evidence is not favored by the courts."

* * * * * * *

"Ordinarily an application for leave to file a bill of review for newly discovered evidence presents for consideration the question of the materiality of the newly discovered evidence and the diligence exercised by the applicant to secure such evidence."

Respondents have heretofore demonstrated that the proceedings below did not comply with the requisites of a bill of review.

Conclusion.

We have noted heretofore that the Board contemplated the existence of either of two alternative conditions, and necessarily knew that the second condition of its formula (which substantially controls the criticized audit of respondents) came into being in the summer of 1935 and continued to exist thereafter (*supra*, p. 39). Thus, with full knowledge of the actual facts, it prescribed a formula to apply thereto. Thereunder the availability of jobs for all claimants, or for all claimants and reapplicants, became entirely immaterial. When the Board introduced Board Exhibits 237, 238 and 239 (*supra*, p. 63), when the Board introduced Board Exhibits 260, 261, 262, the labor survey showing from a time prior to the strike to a time substantially approximate to the conclusion of the hearing, every job, every man employed, month by month, week by week, day by day (*supra*, p. 23), when respondents affirmatively revealed by Respondents' Exhibits 78, 79, 80, 81, 82, 83, 84, 85, that as early as July, 1935, one hundred fifty-four or one hundred fifty-five men, not pre-strike employees, had already been hired (*supra*, p. 47), when the Board found

that prior to November 1, 1935, three hundred sixty-six men had been employed who were not employed on July 5, 1935 (*supra*, p. 23), creating available employment not only for all successful claimants, but as well for all re-applicants, the instant charge of deception becomes grotesque. This proceeding cannot be maintained.

Implicit in the argument in petitioners' brief is the conception that the Board enjoys a royal prerogative and preferential rights in litigation. This is untrue. *Southern Bell Telephone* v. *National Labor Relations Board*, 129 F. 2d 410. Thus (l. c. 412):

> "And we and other courts have made it clear that in its capacity as accuser the Board under the genius of our institutions is held to the same burdens and obligations of proof as any other litigant who takes the affirmative. It may not, by accusing, put the accused upon proof. As accuser it must prove its charge."

In the initial proceeding the Board was an adversary litigant; and no duty of disclosure was imposed upon respondents. It may be noted parenthetically that no proof of non-disclosure, however, is shown. In this proceeding the Board was an adversary litigant, and its rights did not rise above the level of any other litigant under the same circumstances.

We have adverted heretofore, moreover, to the circumstance that under the Act the Board, upon a finding of discrimination, *may* award reinstatement with or *without* back wages. The fallacy of the reasoning of the present Board is that, upon a finding of discrimination,

the maximum rigors of discretionary power must, as of course, be invoked. Such a position is manifestly untenable. A successor Board cannot be heard to assert that the action of its predecessor should be nullified because such action did not impose upon the employer the ultimate in punitive, discretionary remedy. Here the formula of the predecessor Board compelled respondents to set aside, for the benefit of the successful claimants, a fund equal to the average earnings of their putative successors in employment. In other words the successful claimants were credited with the average earnings actually paid those who presumptively, according to the predecessor Board, supplanted them. The Board, therefore, based a back wage award upon the actual experience in wages earned of those who theoretically held, or succeeded to, the successful claimants' jobs. Upon what basis can the successor Board, even if it were free to re-exercise the discretion of its predecessor, argue that this method is inequitable? The substantial character of the award made was reduced only because of the interim earnings elsewhere of the successful claimants.

This record conclusively shows that the successful claimants in their employment before the strike were irregular workers. Their average earnings were therefore reduced. The successor Board, however, asks authorization to award them "full back wages" upon the violent and utterly untenable presumption that if they had been employed on July 5, 1935, there would have been thereafter no turnover in employment, and that they would, without exception, have worked every hour for six years thereafter that respondents' plants operated.

They did not do so before the strike; and upon what basis of logical inference can the successor Board presume that they would have done so following the strike? The record reveals that in the mining and smelting industry, and in the operations of respondents, there is a tremendous labor turnover. That is undenied, but ignored in the present contention made by the successor Board. By what right can the successor Board assume that the claimants would have earned more than their successors, by actual experience, in the same employment? To demonstrate the essential equity of the award in the instant case we caused to be projected, from July, 1935, to the date of reinstatement, the earnings of the claimants as shown by pre-strike experience. Under that calculation, assuming that each claimant would during the six years following the strike not have abandoned his employment or sought employment elsewhere, but continued to have earned his average pre-strike earnings, it appears that only 48 of the approximately 200 claimants would participate in any award (after deduction of interim wages earned elsewhere) and that award would amount to $29,479.21. Whether the present award under the formula, excluding after-acquired properties, as the Board apparently now contends should be done, would exceed this figure is unknown. Petitioners assert the present award is $200,000. The fact, however, that the deduction of interim wages has substantially reduced the amount of the back wage award cannot justify vacating the final decree.

Certiorari should be denied and revoked, and the proceeding dismissed.

Respectfully submitted,

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APPENDIX A.

William Harry Allen	(Tr. 4211).
William Atkinson	(Tr. 5045).
Joseph H. Ballard	(Tr. 5334).
Ernest Bankhead	(Tr. 5792).
John H. Bankhead	(Tr. 4658).
W. J. Barrett	(Tr. 4915).
John A. Basnett	(Tr. 1690; recalled Tr. 2745 and Tr. 7655).
Theodore R. Bennett	(Tr. 5341).
Charles Beyer	(Tr. 5121).
Harry C. Beyer	(Tr. 4803).
A. G. Black	(Tr. 4765).
Thomas W. Black	(Tr. 4927).
Harry Blasor	(Tr. 4234).
Henry Bloom	(Tr. 5451).
Ernest Bogle	(Tr. 5518; Tr. 5554; Tr. 7727).
Fred Bogle, Senior	(Tr. 4628).
Fred Bogle, Junior	(Tr. 991; Tr. 5571).
James Bogle	(Tr. 4633).
W. E. (Mark) Bond	(Tr. 4115).
Roy Boyd	(Tr. 5519).
Ulyes E. Bradbury	(Tr. 1675; Tr. 2805).
Nick Bratz	(Tr. 5243).
H. E. Bridges	(Tr. 3930).
Paul M. Brooks	(Tr. 5347; Rebuttal Tr. 7815).
E. E. Browning	(Tr. 3773; 3785).
A. F. Bruce	(Tr. 4602).
James O. Bryant	(Tr. 5475).
William F. Bryant	(Tr. 5460).

Excell Bullard	(Tr. 5385).
Archie Bunch	(Tr. 4651).
R. F. Burgett	(Tr. 3412).
Joe E. Cagle	(Tr. 3067).
Raymond Cagle	(Tr. 2872; 2888).
William Henry Cagle	(Tr. 5372; 8168).
Irvin Cannon	(Tr. 4840).
Grant Cavin	(Tr. 5256; 5277).
George W. Clark	(Tr. 4582; 4925; 5037; 5159; 7641).
Gus Cooper	(Tr. 4560).
Roy A. Cottongin	(Tr. 4582; 7832).
Carl Creason	(Tr. 3214).
D. G. Creason	(Tr. 3402).
James A. Curry	(Tr. 4952).
Claude Dalton	(Tr. 4806; 7462).
Ira R. Danel	(Tr. 4540; 5735).
Raymond Danel	(Tr. 2543).
Wm. A. Davidson	(Tr. 4380).
Calvin Davis	(Tr. 4896).
Lester A. Davis	(Tr. 4330).
Melgar Densman	(Tr. 4777).
Lewis DeWitt	(Tr. 5184).
Clyde O. Dimitt	(Tr. 4487).
Clifford Doak	(Tr. 2713).
J. C. Dodson	(Tr. 3786; 7528).
Edward Doty	(Tr. 2766).
Jake C. Emerson	(Tr. 4615; 4641).
Clarence Fanning	(Tr. 4907; 4955).
Everett J. Faries	(Tr. 4527).
Lewis G. Fears	(Tr. 3352).
M. D. Ferguson	(Tr. 4844).
Lawrence R. Fleming	(Tr. 5378).
M. C. Forrest	(Tr. 1772; 2750).
Fred Foster	(Tr. 5617).

Henry L. Freeman	(Tr. 5491; 8149).
John E. Freeman	(R. 3795; 8076).
W. S. Faulkerson	(Tr. 5390).
Kenneth Gary	(Tr. 5664).
J. I. Gosnell	(Tr. 3668).
Otto L. Gray	(Tr. 5040).
Luke A. Griffitt	(Tr. 5189; 5223; 7662).
Wm. I. Guinn	(Tr. 4799).
Wesley D. Hamby	(Tr. 4202; 5956).
H. T. Hamilton	(R. 4783; 7838).
Mack Hanks	(Tr. 824; 2216; 2676).
Curtis Harbaugh	(Tr. 3896).
Albert Hardesty	(Tr. 3769).
Ralph O. Haner	(Tr. 4092).
C. G. Harreld	(Tr. 5592).
Alfred P. Hatfield	(Tr. ....).
Roy A. Hatfield	(Tr. 4482; 4550).
J. R. Hays	(Tr. 4019).
G. M. Headley	(Tr. 3751; 3834).
Lee A. Healy	(Tr. 3766).
Ralph Henderson	(Tr. 5608).
Dan Hensley	(Tr. 4698).
J. R. Hensley (James R.)	(Tr. 3222; 7464).
Vivian Hiatt	(Tr. 7305).
H. N. Hilburn	(Tr. 5204; 5237).
Orvil H. Hobson	(Tr. 4595).
Paul Hollingsworth	(Tr. 3105).
Mrs. Hazel Honeywell, Administratrix of the Estate of Wm. E. Honeywell	(Tr. ....).
Cleve Horner	(Tr. 4676).
Kenneth Howe	(Tr. 3497).
Ed. A. Huddleston	(Tr. 4419).
J. D. Hughes	(Tr. 5751).
Harry Franklin James	(Tr. 2777).

Cecil Jeffries	(Tr. 4920).
Roscoe Johnson	(Tr. 4424).
J. L. Jones	(Tr. 5278).
M. F. Jones	(Tr. 5713).
Ben V. Kearney	(Tr. 4282).
A. L. Kinkade	(Tr. 4266).
Earl Kohl	(Tr. 5317).
Carl W. Lake	(Tr. 4598).
Alson Lamb	(Tr. 4439).
Dearrell Largent	(Tr. 3363; 7500).
William Charles LaTurner	(Tr. 4962; 8087).
Arthur B. Lindsey (Roger)	(Tr. 4426).
William E. Livingstone	(Tr. 4143; 6126).
John R. McCormack	(Tr. 5681).
James A. McDonald	(Tr. 4646).
Charles McIntyre	(Tr. 5846).
Fred McIntyre	(Tr. 5703).
James F. McIntyre	(Tr. 5860).
Milton McIntyre	(Tr. 5695).
Ray McIntyre	(Tr. 5854).
Kenneth McNutt	(Tr. 5327).
Earl E. Martin	(Tr. 4371).
Orley F. Martin	(Tr. 5673).
Elmer Mast	(Tr. 4462; 7784; 7807).
Ray Mayfield	(Tr 4351; 8132).
Arthur B. Mays	(Tr. 3331).
John H. Mays	(Tr. 4126).
H. S. Mead	(Tr. 3651).
Everett Messer	(Tr. 4026; 8115).
George Messer	(Tr. 5163; 8129).
John B. Millner	(Tr. 2627).
Chauncey Mitchell	(Tr. 5777).
William Moore	(Tr. 4037).
H. N. Murphy	(Tr. 2669; 6144).
Jess Murray	(Tr. 4053; 7441).

Richard W. Murray	(Tr. 3096; 5964).
Charles H. Newman	(Tr. 2963).
W. C. Novak	(Tr. 2723).
Henry O. Olson	(Tr. 3885).
Eugene Overstreet	(Tr. 4064; 7508).
Walter Overstreet	(Tr. 4828).
Walter W. Parmer	(Tr. 4137).
James B. Parrish	(Tr. 5268).
Charles A. Peterson	(Tr. 3805).
Newton J. Petitt	(Tr. 4723).
Fred M. Pickett	(Tr. 2104).
Fred Pliler	(Tr. 3909).
Albert O. Plummer	(R. 5625).
George D. Pruitt	(Tr. 4790).
Arthur N. Puckett	(Tr. 5368; 7597).
Wesley Qualls	(Tr. 5837).
Robert M. Ransom	(Tr. 5470).
Chas. T. Rhodes	(Tr. 4059; 7891).
James R. Rhodes	(Tr. 3230; 7880).
Howard Rhyne	(Tr. 4345).
Alfred Louis Rice	(Tr. 7326).
Clarence Rice	(Tr. 5642).
Harry L. Rice	(Tr. 2218).
Harry Elmer Ridgway	(Tr. 5410; 5414).
Lawrence Riley	(Tr. 5125; Recalled Tr. 5422).
Joshua Roberts	(Tr. 3872).
Homer W. Rodgers	(Tr. 3432).
Clifford L. Roy	(Tr. 5742).
Richard Sawyer	(Tr. 4096).
Ted Schasteen	(Tr. 5063; 5120).
Mance F. Selle	(Tr. 3061; 8099).
Ross L. Shaw	(Tr. 3778; 6051).
Walter L. Simpson	(Tr. 4968).
John W. Smith	(Tr. 3844).

Wm. F. Souder (Tr. 4289; 4294; 7591).
Virgil Spiva (Tr. 1993; 2587; 2824; 779).
Raymond N. Spurlock (Tr. 4749).
Warren W. Staats (Tr. 3799).
Lee Stancoff (Tr. 5807).
Fay F. Stone (Tr. 5874).
Willard Stoney (Tr. 4333).
Samuel G. Sweet (Tr. 5649).
Earl Earnest Tennis (Tr. 5056; 7689).
James C. Thompson (Tr. 5283).
Roy L. Thornton (Tr. 4341).
William H. Todhunter (Tr. 2655).
E. A. Treece (Tr. 4391).
Arch Underhill (Tr. 2455).
M. J. Vanderpool (Tr. 3613).
C. E. Van Kirk (Tr. 1020; 4147).
I. E. Vaughn (Tr. 3393).
Earl Vinson (Tr. 3384).
W. H. Vinson (Tr. 3381).
Andrew Wade (Tr. 3243).
Clarence Walker (Tr. 5604).
George R. Wallace (Tr. 7767).
Charles E. Ward (Tr. 165; 3194).
Byron F. Warmack (Tr. 3572; 7486).
John G. Warren (Tr. 828; 7855).
Harlan Waughtal (Tr. 3889; 7738).
William Webb (Tr. 5147; 7568).
Lawrence D. Webster (Tr. 3661).
P. L. White (Tr. 3490).
Dorsey Whitlow (Tr. 5578).
Floyd Williams (Tr. 3208; 8070).
Ora Williams (Tr. 3918).
Raymond Williams (Tr. 3857; 8066).
J. E. Wilson (Tr. 3790; 8153).
Howard Wimberley (Tr. 3655).

Todd G. Wisner	(Tr. 3588; 7959).
Elmer Lonnie Wood	(Tr. 3516).
T. D. Wood	(Tr. 2980; 3512).
Glenn Woods	(Tr. 2568).
Lawrence Wood	(Tr. 3464).
Otto Woods	(Tr. 3477).
Scott Yeakey	(Tr. 3200).
W. B. Yingst	(Tr. 3161).
Cecil Yocum	(Tr. 5657).
William Young	(Tr. 3189).